TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 158

MILDA HOPKINS ASHDOWN, PETITIONER,

vs.

STATE OF UTAH

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

PETITION FOR CERTIORARI FILED DECEMBER 17, 1956

CERTIORARI GRANTED JUNE 3, 1957

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INDEX

[fol. A-1]

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF IRON, STATE OF UTAH

Criminal No. 245

STATE OF UTAH, Plaintiff,

vs.

MILDA HOPKINS ASHDOWN, Defendant

INFORMATION—Filed July 23, 1955

Milda Hopkins Ashdown, the defendant above named, having been heretofore, to-wit, on the 22nd day of July, 1955, committed to this Court by David A. Smith, a committing magistrate in and for Iron County, State of Utah, to answer to the charge hereinafter specifically set forth, is accused by Patrick H. Fenton, District Attorney in and for the Fifth Judicial District of the State of Utah, by this Information, of a Felony, to-wit, Murder in the First Degree, committed as follows:

That the said Milda Hopkins Ashdown, at Cedar City, Iron County, Utah, did on the 5th day of July, A.D., 1955, murder one Ray Ashdown.

Contrary to the form of the statutes in such case made, and provided and against the peace and dignity of the State of Utah.

Patrick H. Fenton, District Attorney in and for the Fifth Judicial District of the State of Utah.

[File endorsement omitted.]

At a preliminary hearing of the above entitled matter the following were sworn to testify as witnesses for the State of Utah.

Rymal G. Williams, M.D., Arthur Nelson, Arch Benson.

[fol. A-2] IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR IRON COUNTY

[Title Omitted]

MINUTE ENTRY OF ARRAIGNMENT AND PLEA—July 27, 1955

An information having been filed herein charging the defendant Milda Hopkins Ashdown, with a felony, to-wit, Murder in the First Degree, the defendant was in court with her Counsel, Attorney J. Vernon Erickson, the State was represented by District Attorney Patrick H. Fenton and Iron County Attorney, A. M. Marsden. The defendant was served with a copy of the information which was read to her in open court, to which the defendant entered a plea of not guilty. On Stipulation of the parties the case was set for trial on Monday August 22nd, 1955, at 10 a.m. An order was made by the Court requiring the proper officials to draw the names of 70 jurors from the jury box and to furnish counsel for both the defendant and the State with a list of the jurors drawn with the understanding that they go over and list and delete therefrom names of jurors they know would be disqualified, returning said list to the Clerk of the Court who was ordered to make up a venire of the names remaining on the list and deliver same to the Sheriff with orders to serve same requiring the jurors to report at 10 A.M. on Monday August 22, 1955. The defendant was remanded to the custody of the County Sheriff subject to the further order of the Court.

[fol. 1] IN THE FIFTH JUDICIAL DISTRICT COURT OF UTAH IN AND FOR IRON COUNTY

[Title Omitted]

Transcript of Testimony and Proceedings

Be it remembered that on Monday, August 22, 1955, at ten o'clock a.m. of said day, the above entitled cause came on duly and regularly for trial before the Hon. Will L. Hoyt, judge of the above entitled court, sitting with a jury.

The defendant was personally present in court and the parties were represented by counsel as follows:

APPEARANCES:

For the State: Patrick H. Fenton, District Attorney, Cedar City; A. M. Marsden, County Attorney, Parowan.

For Defendant: J. Vernon Erickson, Richfield.

Thereupon the following proceedings were had:

The Court: Are the parties ready for trial in the case of State of Utah vs. Milda Hopkins Ashdown?

Mr. Fenton: The State is ready.

Mr. Erickson: The defendant is ready.

The Court: The court believes an alternate juror should be drawn. Any objection?

Mr. Fenton: No objection.

Mr. Erickson: The defendant thinks it would be better. [fol. 2] (Thereupon the selection of a jury was proceeded with.)

(12:00 noon, recess of court until 1:30 o'clock p. m. of this day. Jurors admonished by the court according to statute.)

Monday, August 22, 1955—1:30 o'clock p. m.

(Defendant in court with her counsel.)

(The selection of jurors was continued.)

(At 5:00 o'clock p. m., the following persons having been selected as jurors for the trial of this case, were duly sworn:

Mrs. Arvilla Day, Parowan, Mrs. Margaret C. Carpenter, Cedar City, Mrs. Bertha S. Topham, Paragonah, Mrs. Ruth Bentley, Cedar City, Elmer Jensen, Parowan, Ellis Bryant, Summit, Albert R. Clark, Cedar City, Howard Adams, Parowan, Thomas H. Rowley, Parowan, R. Wallace Hulet, Parowan, Ernest Brunson, Cedar City, Leon D. Robinson, Parowan.

Wilson, Fritz, Cedar City (Alternate))

(Jurors admonished by the court. Recess of court until Tuesday, August 23, 1955, at ten a. m.)

[fol. 3] Tuesday, August 23, 1955—10, A. M.

The Court: The record will show the jurors, the alternate juror, the defendant and her counsel and counsel for the State are present. Are you ready to proceed?

Mr. Fenton: The State is ready.

Mr. Erickson: The defense is ready.

The Court: The clerk will read the information to the jury and announce the plea of the defendant.

(The clerk read the information and stated to the jurors that the defendant entered a plea of not guilty.)

The Court: The State may proceed.

Mr. Fenton: Ladies and gentlemen of the jury, the State of Utah will attempt to prove to you by competent evidence in this case that on or about the fifth day of July 1955 in Cedar City, Iron County, Utah, one Ray Ashdown died; that the cause of his death was poison; and that the poison was administered by the defendant Milda Hopkins Ashdown. Thank you.

The Court: Do you desire to reserve your opening statement?

Mr. Erickson: Yes, I will reserve my statement.

[fol. 4] MARTHA TURNBAUGH, called as a witness by the State, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marsden:

Q. Will you state your name?

A. Martha Turnbaugh.

Q. Martha Turnbaugh. How do you spell your last name?

A. T-u-r-n-b-a-u-g-h.

Q. And where do you reside, Mrs. Turnbaugh?

A. Cedar City.

Q. Did you know Ray Ashdown in his lifetime?

A. Well, just as a casual neighbor.

Q. But you did know him?

A. Yes.

Q. Your acquaintance was casual, was it?
A. Yes, sir.
Q. And do you know where Ray Ashdown resided in his lifetime?
A. All, I know is just—I am sure I don't know the address. It was across the street, cater-cornered across the street from my home.
Q. That was in Cedar City, Utah, was it?
A. Yes, sir.

Mr. Erickson: Would you speak just a little louder?
Mr. Marsden: A little louder, please.

Q. Are you acquainted with the defendant Milda Hopkins Ashdown?
A. Just as a neighbor.
[fol. 5] Q. Just as a neighbor.
A. Yes.
Q. Were you in Cedar City on or about the 5th day of July, 1955?
A. Yes.
Q. Now, on the 5th day of July, 1955, state whether or not you saw Ray Ashdown.
A. Yes, sir.
Q. Tell the court and jury where you did see him.
A. In his back door yard.
Q. And that was on the 5th day of July, 1955, was it?
A. Yes, sir.
Q. What was Ray Ashdown doing at that time?
A. Just standing in his back yard.
Q. What time of day was it?
A. I couldn't say.
Q. Was it in the morning or the afternoon?
A. It was in the morning.
Q. What would be your best judgment as to the time you saw him?
A. Well, I am afraid I don't have a very good idea what time it was.
Q. Well, was it approximately noon?
A. No, I think it was before noon.
Q. Did you at that time speak to Ray Ashdown?
A. No, sir.

Q. But as far as your memory is concerned you think it was in the morning of July 5th, is that right?

A. Yes, sir.

Q. And before noon?

[fol. 6] A. Yes, sir.

Q. State whether or not he was just standing still or moving about the yard.

A. When I first saw him he was standing still.

Q. And afterwards, did you see him?

A. He started to walk to the back of the yard.

Q. And you are positive that that was Ray Ashdown that you saw that morning?

A. Well, I just heard a voice and looked up as I was sitting by my window. I just supposed it was him.

Q. Now, do you suppose, or do you know it was him?

A. Well, I am quite sure it was him.

Mr. Marsden: That is all.

Mr. Erickson: No questions.

PAT SORENSON, called as a witness by the State, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Fenton:

Q. State your name, please, ma'am.

A. Pat Sorenson.

Q. Where do you reside, Mrs. Sorenson?

A. Cedar City.

Q. And how long have you lived there?

A. Three years.

Q. Where do you live in Cedar City?

A. 433 South 150 East.

Q. And would you tell us where that is in relation to the Ashdown residence?

A. Their house is on the corner, and then there is the [fol. 7] Standsworth home, and then our home.

Q. Are you on the same side of the street——

A. Yes.

Q. —as the Ashdown residence?

A. Yes.

Q. And which direction do the houses face, your house and the Ashdown house?

A. They face west.

Q. Are you acquainted with the defendant Mrs. Ashdown?

A. Just as a neighbor.

Q. Mrs. Sorenson, I call your attention to the 5th day of July 1955, on that occasion did you see Mrs. Ashdown,—on that date, I beg your pardon.

A. Yes, sir.

Q. Where did you see her?

A. She came over to use the telephone.

Q. And that was at your home?

A. Yes, I was outside.

Q. Do you have any recollection as to the time of day?

A. It was after ten.

Q. Who was present?

A. Just myself.

Q. You and Mrs. Ashdown?

A. Yes.

Q. Will you tell us as nearly as you can who first spoke and what was said?

A. Well, I was mowing the lawn and she asked if she could use the telephone. I said yes.

Q. And after that what happened?

A. We went to go to the front door and it was locked, [fol. 8] and so we went around to the back and she went in and I showed her where the telephone was. And then she used the telephone.

Q. Did she call anyone?

A. Well, I believe she called the doctor. I didn't hear all, what was said.

Q. There was some conversation?

A. Yes.

Q. And you are not sure who she called?

A. I can't remember.

Q. And after the telephone conversation what happened?

A. Well, I was going in to see if she had got her party and apparently she hung up the receiver and went out the front door, and I thought well she had probably got him.

Q. And did you see Mrs. Ashdown again on that day?

A. Yes, she came over a few minutes later.

Q. Will you again tell us who was present, please?

A. Just myself and Mrs. Ashdown.

Q. Just you two?

A. Yes.

Q. Will you tell us who spoke and what was said?

A. Well, I was coming out the front door and she wanted to know again if she could use the telephone. And I says "Yes."

Q. And then what happened?

A. Then we went to go to the front door and it was locked again, so we started around and I told her that I had tried to use it and it was busy but we would go around and see if it wasn't busy. And then she hesitated and [fol. 9] she went over to Mrs. Barnhurst's.

Q. The second trip she did not go into your home?

A. No.

Q. Is that correct?

A. No.

Q. And did you have occasion to see Mrs. Ashdown again on that date?

A. In the afternoon.

Q. Will you tell us where you saw Mrs. Ashdown on that date?

A. We, Mrs. Barnhurst and I, went to the home to give condolences.

Q. When you went to the Ashdown home who was present, when you were there?

A. Mrs. Ashdown and, I believe, a daughter.

Q. And Mrs. Barnhurst and yourself?

A. Yes.

Q. Was anyone else besides the four of you present?

A. Not that I can remember.

Q. Will you tell us as nearly as you can who spoke and what was said?

A. We just told her that we were sorry. And we sat there and talked a while.

Q. And did Mrs. Ashdown say anything to you?

A. Yes.

Q. What did she say?

A. She just said how sorry that she was and—I can't remember everything.

Mr. Fenton: You may cross examine.

[fol. 10] Cross-examination.

By Mr. Erickson:

Q. You say the first trip she made was about ten o'clock July 5th, is that correct?

A. Yes. It might have been a little after ten, because I noticed the clock when I went out to mow the lawn to see how much time I had before lunch and it was about ten minutes to ten then, and I had been out there for a while.

Q. And she asked to use the telephone?

A. Yes.

Q. And she did use the telephone?

A. Yes.

Q. Now, are you sure who she called?

A. Well, I am pretty sure she asked for Dr. Williams.

Q. Did she give a number?

A. I didn't hear the number.

Q. And you are positive she phoned Dr. Williams

A. Well, I am pretty positive.

Q. Are you positive?

A. Yes.

Q. And did she talk to the doctor?

A. I don't know.

Q. Dr. Williams?

A. I don't know. I didn't hear.

Q. You didn't hear?

A. I didn't hear the conversation that went on.

Q. Did she ask for the number; or did she say to get Dr. Williams?

A. I don't know.

Q. You don't recall?

[fol. 11] A. I don't recall.

Q. Dr. Williams' name was mentioned?

A. She said "Is Dr. Williams there?" I can remember that pretty distinctly.

Q. Before you left the room, that was?

A. Yes, I was out on the back porch, sort of out, left the door open and was just out there.

Q. That was after ten o'clock, you say?

A. Yes, sir.

Q. Then she called again from your place?
A. She came again to use the telephone.
Q. Did she use the telephone at that time?
A. No.
Q. Did she tell you who she was calling?
A. She said she wanted to try to see if she could get the doctor again.
Q. Was she crying and in hysterics?
A. She was awfully upset.
Q. Upset. She was crying?
A. I couldn't tell.
Q. You couldn't tell. Then I think you told Mr. Fenton you visited her place.
A. Yes.
Q. That was about what time?
A. I don't recall the time. It was in the afternoon.
Q. An hour or two after. I won't try to confine you to the minutes. Would that be about what time you called at her place?
A. I am not sure.
Q. Mrs. Barnhurst was with you?
[fol. 12] A. Yes.
Q. You stated?
A. Yes.
Q. She being a neighbor.
A. Yes.
Q. Ray was then deceased?
A. Yes.
Q. And you just went over.
A. Yes.
Q. For condolences?
A. Yes.
Q. Is that right?
A. That is right, sir.
Q. What was the condition of Milda? Did she talk to you?
A. Yes.
Q. Was she crying then?
A. Yes.
Q. In hysterics?
A. Not hysterics. Just——
Q. And who was present then, that is of the family?
A. There was a daughter.

Q. A daughter?
A. Yes.
Q. Do you recall which one it was?
A. I don't know their names. She had blond hair, is all that I remember.
Q. Blond hair. About how old was she, as near as you can give us?
A. Thirteen, I would imagine. I am not sure.
Q. Thirteen?
[fol. 13] A. Yes.
Q. Were any of the other children there?
A. Not within the room. I don't know. We didn't see anyone else.
Q. And your name is——
A. Pat Sorenson.
Q. Pat Sorenson.
A. Yes.

Mr. Erickson: I think that is all, Mrs. Sorensen. Thank you.
Mr. Fenton: That is fine, Mrs. Sorenson.

GLORIA JEAN BARNHURST, called as a witness by the State, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marsden:

Q. Will you state your name, please?
A. Gloria Jean Barnhurst.
Q. And where do you reside, Mrs. Barnhurst?
A. 418 South 150 East.
Q. In Cedar City, Utah?
A. Yes.
Q. Were you residing there on July 5th, this year?
A. Yes.
Q. 1955?
A. Yes.
Q. Were you acquainted with Ray Ashdown in his lifetime?
A. Slightly.

Q. Are you acquainted with the defendant Milda Hopkins [fol. 14] Ashdown?

A. Yes.

Q. Did you see the defendant, Mrs. Ashdown, on the morning of July 5, 1955?

A. Yes.

Q. And where did you see her?

A. At my home.

Q. At the time you saw her did you have a conversation with her?

A. Yes.

Q. And who was present?

A. Just me and her.

Q. Just you and Mrs. Ashdown?

A. Yes.

Q. And will you state the substance of that conversation as you best recall it?

A. She came over to my home quite upset and wanted to use the telephone to call the doctor. She said that her husband was awfully sick. So she called the hospital and asked for Dr. Williams. She couldn't get Dr. Williams, he wasn't there, and they didn't know where they could reach him, and I told her if he wasn't back to get some doctor, so she asked for them just to send a doctor up, her husband was quite ill.

Q. Now, you were present when she said those words over the telephone?

A. Yes.

Q. And that in effect and substance is what she said that morning over the telephone?

A. Yes.

[fol. 15] Q. After she got through telephoning did you have any further conversation with her?

A. Yes.

Q. What was that? Will you state it, please, the best you remember?

A. As she was leaving I asked her if her husband was very bad. And she said yes. She said "Do you think I ought to call an ambulance, or take him out to the hospital?" And I said "No, wait. They would send a doctor as soon as they could." And I asked her if there was any-

thing I could do to help, and she said no, she didn't think so.

Q. How far away is your home from their home?

A. Just across the street.

Q. Just across the street. After she got through telephoning and the second conversation you had with her, what did she do then?

A. She left and went home. And I just got back in the house and she came back again.

Q. And did you have a conversation with her this time?

A. Yes.

Q. Will you tell the court and jury what that was, in substance and effect?

A. She was real upset. She said he was much worse and she thought he had had a stroke. And she needed the doctor right fast. She wanted to know if she should call an ambulance or take him out to the hospital. I told her my car was there available and I would take him.

Q. Did she make a telephone call that second conversation?

[fol. 16] A. No. She started to and I told her I could take her in my car.

Q. What did you do? Did you take Mr. Ashdown?

A. She said, "But we can't move him because his legs are stiff." And then I said "Well, we could get the surveyors"—there was some surveyors out that morning surveying the lots, and I told her that we could get them to lift him. And I backed my car out while she asked them if they would help her, and I backed my car up to her step. As I got out of my car Dr. Williams pulled up.

Q. Did you talk to Dr. Williams?

A. Yes.

Q. Was Mrs. Ashdown present at that time?

A. She was in the house and we were outside.

Q. Did you go in the house?

A. I started in a couple of times, then decided I better not.

Q. You never did go in that morning?

A. No.

Q. You will have to answer yes or no.

A. No.

Q. So the reporter can get it.

A. No.

Q. After you saw Dr. Williams did you see Mrs. Ashdown again that morning?

A. Yes.

Q. Yes. And when? About what time did you see her?

A. I seen her in the house.

Q. You went in her house?

[fol. 17] A. No, I could see her through the screen.

Q. Just through the screen. Oh, you were on the porch, were you?

A. Yes.

Q. And did you have a conversation with her?

A. Just more or less trying to console her.

Q. And who was present at that time?

A. Dr. Williams, and I think three or four of her children.

Q. Three or four of Mrs. Ashdown's children?

A. Yes.

Q. Was Mrs. Sorenson present?

A. No.

Q. Do you remember what was said or done at that time when you were on the porch looking through the screen door?

A. It is sort of vague——

Q. You don't know.

A. I couldn't say actually.

Q. You don't remember.

A. No.

Q. Did you later that morning see Mrs. Ashdown in company with Mrs. Sorenson?

A. No.

Q. You don't recall?

A. No.

Q. Now, calling your attention to the second time that Mrs. Ashdown came to your place that morning, did she state the condition of her husband?

A. Yes.

Q. Will you state what she said about his condition?

[fol. 18] A. She said he seemed to be in a lot of pain; that he was going paralyzed from his waist down.

Q. Do you recall anything else she said as to his condition?

A. Only when she came back the second time, she said he was a lot worse.

Mr. Erickson: I didn't hear you.

A. She just said, the second time she came, that he was much worse.

Mr. Erickson: Much worse.

A. Hadn't felt well since his breakfast, she said.

Mr. Marsden: I think that is all.

Cross-examination.

By Mr. Erickson:

Q. You said you backed your car up to the place.

A. Yes.

Q. Did you locate the surveyors?

A. She talked to them.

Q. And they were going to take him to the hospital?

A. Well, they were going to load him into my car, put him in, so we could take him.

Q. Mrs. Sorenson, did the doctor come before you attempted to load him into your car?

A. Oh, yes.

Q. That was Dr. Williams?

A. Yes.

Q. Did you talk to Dr. Williams?

A. Yes.

Q. At all?

A. Yes.

Q. Where were you when Dr. Williams arrived?

[fol. 19] A. I was just getting out of my car after I backed it up to the door.

Q. Then you immediately went in the house?

A. Yes.

Q. Is that right?

A. Yes.

Q. You didn't hear any conversation that Dr. Williams had with Milda?

A. Yes.

Q. What was said then?

A. He just asked him two or three times if he was in lots of pain, and he said no.

Q. Now, you told Mr. Marsden that she told you he was in severe pain.

A. Yes.

Q. That was the first conversation, is that right?

A. Yes.

Q. Then you stated that she said he was paralyzed from the waist down.

A. Yes.

Q. Was Dr. Williams present then?

A. No, that was in my home.

Q. When that statement was made.

A. That was in my home.

Q. That was in your home?

A. Yes.

Q. Then you had how many conversations with the defendant Milda?

A. Two.

Q. Two. Only two?

[fol. 20] A. Yes.

Q. Is that right?

A. Yes.

Q. Well, you first stated to Mr. Marsden that he was paralyzed, is that right?

A. That is what she told me.

Q. Then you stated again that he was paralyzed from the waist down, didn't you? When did she make that statement?

A. I don't recall exactly whether it was the first conversation or the second, but I think it was the second.

Q. You wouldn't be sure of that?

A. I couldn't swear to it.

Q. It could have been that she told you that the first time.

A. Yes.

Q. You wouldn't be positive?

A. It seems like she said his feet first.

Mr. Erickson: I think that is all, Mrs. Barnhurst. Thank you.

Mr. Marsden: That is all.

Mr. Fenton: Your Honor, the next witness should be Dr. Williams. I think it would be improper to put the

others on before the doctor gets here. He said he would be here by eleven o'clock.

(Discussion as to witnesses)

The Court: We will take a recess until he comes.

(10:35 a. m. Jurors admonished by the court. Recess)

[fol. 21] AFTER RECESS

11:25 A.M..

(Jurors and alternate all present; defendant in court with her counsel.)

DR. R. G. WILLIAMS, called as a witness by the State, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marsden:

Q. Will you state your name, please?
A. Dr. R. G. Williams.
Q. And where do you reside, doctor?
A. Cedar City.
Q. That is in Iron County, Utah?
A. Iron County, Utah.
Q. What is your profession, doctor?
A. Medicine and surgery.
Q. Are you licensed by the State of Utah to practice medicine and surgery?
A. I am.
Q. How long have you practiced medicine and surgery?
A. Practiced eight years in Cedar City.
Q. Were you practicing medicine in Cedar City on July 5th, 1955?
A. Yes, sir.
Q. Were you ever acquainted with Ray Ashdown in his lifetime?
A. Yes. I was very well acquainted with him.
Q. Had you been his physician and surgeon?
A. Yes, sir.

Q. Did you receive a call on the morning of July 5, 1955, to attend Ray Ashdown?

[fol. 22] A. Yes, sir.

Q. Will you state the circumstances of that call?

A. I was working in my office at Cedar City Clinic, and I received this call to come immediately to the Ashdown residence. My nurse gave me the call.

Q. Did you go to the Ashdown residence?

A. Yes, sir. I responded promptly. I left the office within a few seconds after I was called and went directly to the Ashdown home.

Q. And did you see Ray Ashdown there?

A. Yes, sir.

Q. State what his condition was, if any. Was he ill?

A. On entering his home he was lying on the davenport and in acute distress. He was having a generalized convulsive seizure and death looked to be imminent when I first saw him.

Q. Was anyone present besides you and Ray?

A. Mrs. Ashdown was standing by the couch.

Q. Did you have a conversation with either Mrs. Ashdown or Ray at that time?

A. Yes, I did. I directed most of my conversation to Ray, because he looked like he was going to die within a few minutes.

Q. Will you state the substance of that conversation as you best recall it?

A. I went up to the couch, and I said: "Ray, what have you taken? Have you taken any poison? Have you eaten anything spoiled?" Because he looked like he had ingested some toxin of some kind. He was in a generalized state [fol. 23] of convulsion. It was very difficult for him to talk. And I administered a sedative to him hypodermically, in the vein, to relax him for just a minute or two so he could speak. And I said: Ray, have you taken anything poison?" And he said "No." I said: "Have you eaten anything spoiled?" He said "No." I said: "Were you well this morning when you got up?" He said: "Yes." I said: "When did you get sick?" And he said: "A little while ago." I said: "Hav-n't you drunk anything or eaten anything?" He said: "I had some lemonade about half hour ago."

Q. Do you recall, doctor, whether he used the word lemonade or lemon juice?

A. He used lemon juice. He said: "I had some lemon juice about a half hour ago." And I said: "How did it taste, Ray?" And he started into another convulsion, and he said, "Doc, it tasted bitter." Then he rolled his eyes back and threw his head back and went into a generalized convulsive seizure and died.

Q. He died in your presence?

A. Yes.

Q. Now, you know where the Ashdown home is, do you?

A. Yes, sir.

Q. Is that in Cedar City, Iron County, Utah?

A. Yes.

Q. Is that where he died in your presence?

A. Yes, sir.

Q. After he died what did you do?

A. I might mention, too, before he died, he was pleading for me to do something, just before he went into his last convulsion he drew his hands back——

[fol. 24] Q. If you will, doctor, the best that you recall, give the statements that he made to you.

A. I remember vividly what he said before he died. He says: "Doc, what is wrong with me?" And I gave him another hypo, and he said: "Doc, can't you do something for me, please do something." And then he died.

Q. Do you recall whether or not he made any statement as to who prepared the lemon juice?

A. No, I didn't ask him that. I was to concerned about his condition. I didn't interrogate as to who prepared the lemon juice, or anything of that sort.

Q. But he did state to you that he had drunk some lemon juice?

A. Yes.

Q. And that it was bitter?

A. Yes.

Q. Was Mrs. Ashdown there during your attendance at that time?

A. Yes, sir.

Q. Will you state if you can, doctor, just a little more about his condition as you diagnosed it and what in your professional opinion was wrong with him?

A. Well, when I first entered his room, he was in this generalized convulsion and he was stiff as a board and had his jaws set and his fists clenched and his legs were shaking and stiff and rigid, convulsive; and my first impression was that he had been poisoned with something because there are only a few things that would give you that sort of a picture; that is why I directed my statement, my first statement to the fact if he had ingested any poison [fol. 25] or eaten anything spoiled, because it was my impression he was dying of a poisoning, his outward appearance gave me that impression.

Q. Now, after he died what next did you do?

A. Well, when I first got there I summoned an ambulance. If I remember correctly Mrs. Barnhu-st who was standing on the front door step, I instructed her to race across the street and call Rube Winterrose's ambulance and have him take this man to the hospital. There was no phone in the Ashdown home. And by the time Mr. Winterrose arrived Ray was dead.

Q. What does Mr. Winterrose do?

A. He is a mortician in Cedar City, Utah.

Q. Did he take Ray's body to the mortuary, if you know?

A. I left, and I instructed him not to take him, or not to molest anything there; that I thought the coroner's jury should be called to investigate the circumstances in and about the residence in such a case as this. And I told Mr. Winterrose that——

The Court: Just a moment——

Mr. Erickson: That is hearsay.

The Court: Will you refrain from telling what you said?

A. I just told Mr. Winterrose——

The Court: Just a moment, refrain from telling what you said.

A. Oh.

Q. When did you next see the body of Ray?

A. I left then, and I saw him the next day at the Southern [fol. 26] Utah Mortuary.

Q. Did you do an autopsy on Ray?

A. I did. I did a complete autopsy on him.

Q. Will you state to the court and jury just what your autopsy consisted of and why you did it?

A. Well, I took——

The Court: Just a moment. Don't tell why you did it.

A. Did a complete autopsy.

Q. Just a minute, doctor. You might state what you did in that autopsy.

A. I examined all of the organs, all of the internal organs, did a complete autopsy, we examined all the internal organs, including the brain and spinal cord, heart, lungs, kidneys, liver, intestines, stomach, bladder, spleen, and the other internal organs. We examined them all for any evidence of cause of death. And I took specimens from each of those organs, portions of the organs for examination, including the stomach and the contents that were in the stomach.

Q. And what did you do with those specimens?

A. I put them in a container and kept them in my custody, took them to the Cedar City Clinic where I labeled them personally and turned them over directly to Mr. Arch Benson.

Q. Do you know what office Mr. Benson holds?

A. Deputy sheriff of Iron County.

Q. Were these specimens packaged under your supervision?

A. Yes, sir, I packaged them personally and labeled them, each specimen.

[fol. 27] Q. And delivered them to the deputy county sheriff, Arch Benson?

A. Yes, delivered them personally directly to him in the Cedar City Clinic.

Q. I think you stated that you took some samples of the contents of the stomach?

A. Yes, sir.

Q. And did you mark that separately, label that separately?

A. Yes, I labeled every specimen separately.

Q. Did you number the specimens, or just label what they were?

A. I just labeled what they were and wrote in my own handwriting what they were and put a label on.

Mr. Marsden: That is all.

Mr. Fenton: It is going to be necessary to recall the doctor.

The Court: If that is the case, Mr. Erickson, do you wish to cross examine now or after the State completes the direct examination. You may cross examine Dr. Williams now or reserve the right after the State has completed the direct examination.

Mr. Erickson: I think I would like to cross examine now.

The Court: You may do so.

Cross-examination.

By Mr. Erickson:

Q. Now, doctor, you previously testified before the committing magistrate, Mr. Smith, is that right?

A. Yes, sir.

Q. Now, as I recall, doctor, did you not say to Ray Ash- [fol. 28] down, "Have you been drinking and drunk?" "Have you been drunk on July 4th?" Didn't you make that statement?

A. Yes, I asked him if he had been drinking.

Q. Didn't you say in words and effect this: "Have you been drunk yesterday morning" when you came into the place, is that right?

A. I asked him if he had been drinking on July 4th or if he had been drunk, yes.

Q. That is correct, you made that statement?

A. Yes.

Q. To him?

A. I did.

Q. Now, I will ask you, doctor, you said you had word from the clinic to come to the home of the Ashdowns, is that correct?

A. Yes.

Q. Now, I ask you, doctor, do you know who called your nurse asking that you come to the Ashdown residence?

A. I don't know who called the Clinic, my nurse at the Clinic. But after I arrived home, later, my wife informed me that she had received a call from whom she thought was Mrs. Ashdown.

Q. That is correct, you later found out that it was Mrs. Ashdown that called your wife.

A. Yes, sir.

Q. And asked you to come to the home as quick as you could get there, that is correct, is it?

A. Yes. I later found that out, after I arrived home.

Q. Now, I will ask you, doctor, you talked to Milda when [fol. 29] you arrived at the Ashdown home, is that correct? That is the defendant?

A. Yes.

Q. I will ask you, doctor, did she tell you that she had given him salt water?

A. Yes, she told me that she had given him two or three glasses of salt water.

Q. Salt water.

A. I remember.

Q. Assuming a person had strychnine and had taken it, what effect does salt water have?

A. Makes them die quicker.

Q. Die quicker.

A. Yes, it hastens, it hastens the poison.

Q. Isn't that the remedy they give for strychnine, to give you salt?

A. I don't know. I know——

Q. Isn't that a fact? Doesn't your medical book tell you that?

A. No. No——

Q. Does it not cause vomiting, salt water?

A. In some cases a large quantity may.

Q. Isn't that a fact, doctor?

A. In some cases it might, a large quantity might promote vomiting.

Q. It isn't might. It does, doesn't it?

A. Not always. It depends on the case.

Q. You know physicians that give it?

A. Well, I don't know——

Q. For poisoning?

[fol. 30] A. I don't give it for poisoning.

Q. You don't give it. Do you remember about what time you arrived at the Ashdown residence?

A. Yes, approximately, it was around 11:35, 11:40, along in there, a. m.

Q. Do you remember who was present at the Ashdown residence then?

A. Yes.

Q. Who was present?

A. I saw Mrs. Ashdown, of course, inside with her husband, and on going up the front step I encountered the neighbor lady, Mrs. Barnhurst.

Q. That is correct. She came in the room?

A. Who is that?

Q. Was she in the room when you were talking to Mr. Ashdown?

A. Was who in the room?

Q. Mrs. Barnhurst?

A. No, she was outside the screen door on the step when I first saw her. I don't believe she came in. I am not sure about that.

Q. Do you recall of seeing any of the children?

A. No. I didn't see any of the children, if I recollect.

Q. Now, I will ask you, doctor, did you talk to Mrs. Ashdown?

A. Yes.

Q. Would you tell the jury her words?

A. I asked her——

Q. As you recall.

A. I asked her if she knew what was wrong with him and [fol. 31] how long he had been sick and a few of those questions.

Q. Was she crying?

A. Yes.

Q. You stated she was under a mental shock, is that right?

A. Yes, she was——

Q. Is that right?

A. She was quite panicky and crying out loud, and told me she didn't know what was the matter with him.

Q. Wringing her hands?

A. Yes. And then she went ahead to say that she had given him some salt water.

Q. Now, I will ask you, wasn't she pleading with you, "Don't let him die!" Didn't she say that?

A. She didn't say it to me. But she said it to Ray. She said "Don't die, Ray." "Don't die."

Q. Wringing her hands, crying, pleading with Ray not to die, is that correct?

A. Yes, she pleaded with Ray——

Q. You heard that.

A. She was pleading with him not to die.

Q. Now, I will ask you, doctor, didn't she ask you to do something for him, do something for him. Didn't she make that statement?

A. I don't remember. Ray asked me to do something for him.

Q. I will ask you this, doctor, she asked him not to die, and pleading with you to save him, is that right? Your answer was yes, is that right?

A. I don't remember her pleading with me to save him, but she was telling him——

Q. Well, did you say that, or didn't you?

[fol. 32] A. I don't believe I said the last part of it.

Q. Reading down on page 12:

"Q. All right, now, doctor, how long was that before they called the hospital?

"A. I don't know.

"Q. You don't know.

"A. I don't know, but I assume it was a matter of minutes.

"Q. A matter of minutes.

"A. My home call and the call in the clinic.

"Q. Now, as you entered the room there, who spoke to you first, Mrs. Ashdown or Mr. Ashdown?

"A. I am sure Mrs. Ashdown did."

Do you remember making that statement?

A. I don't remember.

Q. You don't remember. Would you say you didn't make it?

A. No, I said I didn't remember it.

Q. All right.

"Q. What were the words she said to you, doctor? Do you recall?

"A. I don't recall exactly. But I do know that she seemed to be extremely—she was crying and she was in a state of mental shock."

A. That is correct.

Q. You stated that?

A. Yes, sir.

Q. "you might say, and she was wringing her hands and crying and pleading with Ray not to die."

A. That is true.

[fol. 33] Q. That is true.

A. Yes.

"Q. Not to die.

"A. Yes.

"Q. And pleading with you to save him, isn't that right?"

Mr. Marsden asked you. And you said yes. Is that correct.

A. Well, I don't remember her pleading with me, if I understood it.

Q. Do you say you didn't?

A. Unless I misunderstood his question. She was pleading with Ray. I don't remember her pleading with me.

Q. This doesn't say that. I will ask you, did you say this in the preliminary hearing?

A. I don't remember of her pleading to me.

Q. Did you or did you not?

A. I don't remember.

Q. Did you say it, or did you not? Can you answer that?

A. Well, when somebody is dying you don't always remember who talked to you first.

Q. That is your question and answer.

A. Yes.

Q. He said:

"Q. Is that true?"

And you answered:

"A. Yes, she asked me to do something for him."

Now, can't you tell me? Did you say that, or didn't you?

A. She might have done.

[fol. 34] Q. She might have done?

A. I was trying to save the man's life.

Q. Yes.

A. A lot of conversation might have gone on without——

Q. She was trying to have you save him for her, wasn't she, doctor?

A. Yes, she wanted him to live, yes.

Q. Yes.

A. She wanted him to live.

Q. That is what I wanted you to answer. Do you remember about how long, doctor, you were in the home before he died?

A. Oh, I don't imagine it was over five or ten minutes.

Q. Five or ten minutes.

A. About, as near as I can remember.

Q. The cause of his death you ascertained was what, doctor?

A. Strychnine poisoning.

Q. Strychnine poisoning. I ask you, doctor, is there any other poisons that paralyze the central nervous system save and except strychnine?

A. Yes, I suppose there are various toxins that would have their seat of action on the central nervous system, but nothing that looks quite so typical as strychnine when you see it.

Q. There are some that resemble it, are there not, doctor?

A. There are toxins that paralyze the central nervous system, probably some I don't——

Q. What is that?

A. I can't enumerate many of them, that cause that same type of convulsion.

[fol. 35] Q. What about the black widow spider? What similarity is there there?

A. It has its action on the central nervous system, but I have never seen anybody die from a black widow spider bite. A toxicologist probably could answer that better than I.

Q. You are not a toxicologist?

A. No.

Q. Now, doctor, I will ask you if strychnine has been related to other compounds it has the same effect.

A. I suppose there are other poisons that simulated in its action, yes. I couldn't enumerate them.

Q. There are several.

A. I am quite sure of that.

Q. That is right.

Mr. Erickson: I think that is all, doctor.

Redirect examination.

By Mr. Marsden:

Q. Doctor, I would like to ask you this question. How long a time elapsed from the time you got to the Ashdown home on the morning of the 5th until Ray died? How long were you there?

A. I imagine not over five or ten minutes.
Q. How long did he live after you got there?
A. Oh, five or six minutes, perhaps.

Mr. Marsden: I think that is all.

Recross-examination.

By Mr. Erickson:

Q. Just one more question. I think you stated as soon as you got there you gave him a sedative.
[fol. 36] A. Yes.
Q. What was that barbitol?
A. Yes, I gave him some intravenous nembutol.
Q. What was that, nembutol?
A. Nembutol, intravenous nembutol and a shot of damerol, both.
Q. Damerol?
A. Yes.
Q. Of course, damerol is deadening the pain.
A. Yes.
Q. It takes some time for nembutol to work; damerol works quicker, does it not?
A. No, when either one is given in the vein it acts almost instantaneously. It is given right in the blood stream.
Q. Of course that works quicker, it relieves pain quicker?
A. Yes, in a matter of seconds.
Q. Than giving a nembutol tablet.
A. Yes, that wouldn't be absorbed for half an hour.
Q. For half an hour or more.
A. Yes.

Mr. Erickson: Thank you, doctor.

(12 noon. Jurors admonished by the court.)

(Recess until 2 o'clock p. m.)

[fol. 37] Tuesday, August 23, 1955—2:00 P. M.

(Jurors all present. Defendant in court with counsel)

ARCH BENSON, called as a witness by the State, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marsden:

Q. Will you state your name, please?
A. Arch Benson.
Q. And where do you reside, Mr. Benson?
A. Parowan, Utah.
Q. Do you hold an official position with Iron County, Utah?
A. Deputy Sheriff, Iron County.
Q. Are you acquainted with Mrs. Milda Hopkins Ashdown?
A. Yes, sir.
Q. Were you acquainted with Ray Ashdown in his lifetime?
A. I have been acquainted with him the last few years.
Q. You knew who he was?
A. Yes, sir.
Q. Are you acquainted with Dr. Rymal Williams?
A. Yes, sir.
Q. On July 6, 1955, did you go to Dr. Williams' Office?
A. Yes, sir.
Q. And state to the jury and court what you did there.
A. At the request from the county attorney and Sheriff Nelson I went to Dr. Williams' office and picked up some specimens.
Q. Will you state, if you know, what those specimens were?
A. I picked them up——

The Court: Just a moment. I believe you had better [fol. 38] reconsider that question.

Mr. Erickson: I object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained. He may answer yes or no to that question but not go into any narratives.

Q. Will you answer that question yes or no?
A. Yes.
Q. Well, state further what was done by you at that time.

The Court: Will you refrain from relating any conversations?

Q. Just state what was done by you.

A. I went from there direct over to the sheriffs' office, closed my car up and got what things I needed and went from there straight to Salt Lake. And the next morning——

The Court: Just a moment. Wait for a further question.

Mr. Erickson: I object to that, your Honor, as incompetent, irrelevant and immaterial.

The Court: You may proceed with a further question.

Q. Was there any packages delivered to you at that time?

Mr. Erickson: I object to that as incompetent, irrelevant and immaterial.

The Court: What time are you referring to now?

Mr. Marsden: On July 6th, at Dr. Williams' office.

The Court: He may answer.

A. Yes, sir.

Q. And what did you do with them?

[fol. 38] Mr. Erickson: Object to that as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I took them to the State Capitol, Salt Lake City.

Q. Where did you deliver them at the State Capitol.

A. To M.——

Mr. Erickson: I object to that, your Honor, as incompetent, irrelevant and immaterial.

The Court: He may answer.

Mr. Erickson: The State Capitol.

A. M. Elmer Christensen, State Chemist, at the State Capitol.

Q. Do you know Mr. Christensen?

A. Yes, sir.

Q. Is he present in court?

A. He is present in court, yes, sir.

Q. Could you point him out?

A. Right there, with the gray suit.

Q. Is that the man you delivered the package to?

A. Yes, sir.

Q. And you delivered them to him personally, did you?
A. Yes, sir.

Mr. Marsden: That is all.
Mr. Erickson: That is all.
Mr. Fenton: Your Honor, we would like the privilege to recall Mr. Benson at a later time. There is some testimony I don't think would be proper at this time.
The Court: You may do so.

[fol. 40] M. ELMER CHRISTENSEN, called as a witness by the State, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Fenton:

Q. State your name, please.
A. M. Elmer Christensen.
Q. And where do you reside, Mr. Christensen?
A. Salt Lake City, Utah.
Q. And will you tell us what your profession or occupation is?
A. State Chemist for the State of Utah.
Q. Would you tell us your educational background, Mr. Christensen?
A. I am a graduate of the University of Utah in 1923 with a Bachelor of Science degree in chemistry.
Q. And what experience have you had in the chemical field?
A. Thirty years of analytical chemistry in the State Chemist's office.
Q. And you stated that you are at present State Chemist for the State of Utah?
A. I am, sir.
Q. How long have you held this position?
A. Twenty-one years.
Q. Would you tell us the nature of your duties as State Chemist for the State of Utah?
A. The State Chemist's duties include analyses of all types of material submitted by the State Department of Agriculture, or any of its subdivisions; also analysis of materials submitted by the liquor commission. For many

years it included analytical service for the State Board of [fol. 41] Health, which included chiefly water samples.

Q. And will you tell us your experience in relation to analyzing substances that might have poison in?

A. In the course of my service to the State Department of Agriculture I have had occasion on numerous occasions to analyze organic tissues of various animals, cows, sheep, dogs, cats, horses, for quite a wide variety of poisons. I have served in a special capacity over the years in doing that same type of work for city and country enforcement, police departments.

Q. And specifically, Mr. Christensen, will you tell us the experience you have had in analyzing various substances to determine whether or not they contained strychnine.

A. Yes, many of those samples, a large number of them, have contained strychnine.

Q. And do you have an idea, Mr. Christensen, how many strychnine analyses you have made in your position as State Chemist during the time you have been in the State Chemist's office?

A. Well, I would only be able to give a very rough estimate.

Q. Could you give us your estimate, please, sir?

A. Well, about 100 to 150 samples.

Q. And have you had any experience, Mr. Christensen, in relation to analysis of components of the human body in relation to strychnine contents?

A. Human body, yes sir, I have.

Q. Would you tell us as nearly as you can remember how many analyses of that type you have made?

A. I would judge probably twenty to thirty, maybe. That is a rough estimate, conservative. I think it is a conservative number.

[fol. 42] Q. I think that is fine. I call your attention, Mr. Christensen, to the 6th of July, 1955, or thereabouts. Are you acquainted with Mr. Arch Benson?

A. Yes, sir, I am.

Q. Did you have occasion to see Mr. Benson on the 7th or the 6th of July?

A. I saw him on the 7th of July, 1955.

Q. And where did you see Mr. Benson?

A. In my office at the State Capitol, Number 35.

Q. And will you tell us what happened when you saw Mr. Benson? Don't tell us what was said, please. Tell us what happened.

A. Mr. Benson delivered to me a cardboard box containing several receptacles.

Q. And what did you do with that box?

A. I removed from the box two of the containers which were glass containers. And after some discussion with him we decided I would not do anything with the remaining. They were left intact in the box, placed in my refrigerator.

Q. Will you describe the nature of the receptacles in the box, as nearly as you can?

A. The receptacles which I took from the box?

Q. Yes.

A. One of them contained a glass jar of approximately a quart capacity, with a wide mouth and a grey screw-cap lid. On the top of the bottle was a Dennison gum label bearing the marking "Stomach and Contents." Sealed over the edge of the lid and adherring to the glass surface on [fol. 43] the outside were several strips of scotch tape. The other bottle was a small, probably half pint I would say, glass bottle, with an inscription on it, "Fruit Juice From Refrigerator," also on a Dennison gum label.

Mr. Erickson: Also what?

A. The inscription was on a Dennison gummed label.

Mr. Erickson: Dennison gummed label.

Q. Now, Mr. Christensen, will you tell us what you did with those two specific samples or specimens.

A. I broke the seal on the larger of the two containers which bore the label "Stomach and Contents", removed the contents into a large evaporating dish. Do you want a detailed statement of the procedure?

Q. Yes.

A. I examined the two ends, noted that it was a stomach, resembling a human stomach, tied with string at the two ends. The stomach was rather normal in appearance, slight pinkish color with blotches of gray. I made an incision in the stomach with a small scissors and laid it open with forceps, examined the inside, and made a few preliminary tests on the stomach, inside of the stomach. I was interested

first to note the character of the contents and found that there were no solid particles of any kind, no glass, no sharp pointed particles, no solid particles of food that I could identify. In fact there were none, no solid particles of food. The contents consisted entirely of liquid and heavy, jelly-like mucus; it was yellowish in color; the reaction of it was slightly acid; the walls of the stomach on the in- [fol. 44] side were heavily convoluted or wrinkled; there were several splotches of gray color, but in general the stomach was a normal pinkish color. I removed from the inside of the stomach seventy-five cubic centimeters, or two and a half fluid ounces, of the contents, placed it in a larger beaker which I considered was about three-fourths of the total contents of the stomach. The stomach was then folded together and replaced in the jar, the jar was replaced in the refrigerator along with the other receptables. I took 100 cubic centimeters from the other container, slightly more than I used for the contents from the stomach, and placed it in another beaker, which was labeled "fruit juice from refrigerator;" the two samples were then treated alike. I was making a determination for strychnine. I might say that——

Mr. Erickson: Just a minute, doctor——

Q. O. K., go ahead.

A. I might say that accompanying the box was a sealed envelope which contained a pink slip, written on Cedar City Clinic prescription pad paper, with a note from Dr. Williams requesting an analysis of the material in all samples for evidence of poison, particularly strychnine or arsenic; and it was following a discussion of the problem with Deputy Sheriff Benson that I decided to go ahead with the strychnine test only. And so I proceeded with that analysis. In both cases the fluid placed in 250 cubic centimeter beakers was evaporated to about half its volume. It was acidified then with dilute sulphuric acid and 95 per cent grain alcohol [fol. 45] added and the material permitted to stand for four hours. At the end of that time, the material was stirred frequently—at the end of that time it was filtered through filter paper and then evaporated, the filtrate was evaporated to dryness in another glass container. When it was dry, which took practically the balance of the day, after it was

dried it was taken up with water, distilled water, macerated with a glass rod, stirred for some time, and then that residue and the liquid water was filtered again. The Filtrate, the material that went through the filter paper was checked to make sure it was still acid which it must be up to that stage. At that point it was rendered alkaline with dilute potassium hydroxide or caustic potash solution. The residue on the filter paper was washed several times and the alkalinized filtrate then placed in a separatory funnel which is a pear shaped funnel large enough to contain four ounces of liquid, a glass stopper container and pear shaped, an inverted pear shape. The solution was placed in the funnel, now alkaline in reaction and chloroform added, it was shaken several times with chloroform and allowed to stand in between shakes. This process lasted for about an hour. Then the chloroform was filtered off or drawn off in the separatory funnel and filtered into a small beaker. The small beaker was allowed to evaporate very slowly on a water bath and the residue, if any, left upon evaporation in the glass beaker was then examined for the presence of strychnine. In the case of the sample which was marked "Fruit Juice From Refrigerator" there was no residue whatsoever in the beaker, that is, from the chloroform extract. That [fol. 46] sample was therefore discarded and the report submitted "Strychnine, none." The other sample did contain an appreciable residue in the bottom of the beaker, was examined under a microscope and determined that it was crystaline in nature; and a small portion was applied to my tongue with a moist tip of my finger and determined that it had an intensely and persistent bitter taste, characteristic of strychnine.

Mr. Erickson: What was that?

A. Characteristic of strychnine.

Q. Characteristic of strychnine.

A. That is right, bitter tasting. A small amount, just a few drops of chloroform was added to the beaker, stirred a few minutes and about six or eight drops, just a few drops, was placed on a white spot plate, or a white porcelain plate with several depressions in it. In one of these depressions I placed about six to eight drops of chloroform solution. That was allowed to evaporate spon-

taneously, and then a final confirmatory test for strychnine was made by adding a drop of concentrated, chemically pure, sulphuric acid to the residue in the spot plate, and then teasing into it from the edge a few crystals of potassium dichromate. Immediately upon touching sulphuric acid solution a brilliant purple color developed which is a confirmatory test for strychnine.

Q. Mr. Christensen, is this procedure you have outlined the normal procedure in your office for a strychnine analysis?

A. Yes, sir.

Q. And do you know whether or not, Mr. Christensen, [fol. 47] this procedure is the normal procedure among the chemical profession?

A. It is.

Q. To determine a strychnine analysis?

A. In organic materials, yes, sir.

Q. Then, Mr. Christensen, based upon the test that you made do you have an opinion whether or not the sample marked "Stomach and Contents" contained strychnine?

A. I would say from the test which I made that the contents of the stomach contained strychnine.

Q. Mr. Christensen, after you made your examination what did you do?

A. A report was written up on our department letterhead, or report form, which I signed and sealed in an envelope and delivered it in person, with all of the specimens which were originally given to me by Deputy Sheriff Arch Benson, which occurred on the late afternoon of July 8, 1955.

Q. And where did this delivery take place?

A. In the office of the State Chemist, Number 35, State Capitol.

(2:30 P.M. Jurors admonished by the court. Jurors retire from the courtroom.)

Q. Mr. Christensen, I think you stated a moment ago that in relation to the sample marked "Fruit Juice in Refrigerator" that you made an official report?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

(Document marked for identification Plaintiff's Ex-
[fol. 48] hibit 1.)

Q. I show you now, Mr. Christensen, what has been marked for identification as Plaintiff's Exhibit 1. Have you seen that before?

A. Yes, sir.

Q. And do you know what it is?

A. This is my report of the analysis of the sample marked "Fruit Juice In Refrigerator."

Q. And is that your signature?

A. Yes, sir.

Q. On that report.

A. It is.

Q. Will you examine that carbon and tell us whether or not that is a correct carbon of the original?

A. Yes, sir. It is.

Q. And does that also bear your signature?

A. It does.

Q. Is that the report you were talking about a few moments ago when you stated in connection with the sample marked "Fruit Juice in Refrigerator" that you have made a report?

A. Yes, sir.

(Document marked for identification Plaintiff's Exhibit 2.)

Q. Mr. Christensen, I now show you what has been marked for identification as Plaintiff's Exhibit 2. Have you seen that before?

A. Yes, sir.

Q. Tell us what that is, please.

A. This is my report of analysis of the contents of the stomach in the case of Ray Ashdown.

[fol. 49] Q. And have you signed that report in your official capacity as State Chemist?

A. Yes, sir.

Q. Will you please examine that carbon attached thereto and tell us if that is a correct carbon.

A. Yes, sir, it is.

Q. And have you also signed that in your capacity as State Chemist?

A. I have.

Q. And is this report the one you spoke of a few moments ago when you stated you had made a report on the specimen marked "Stomach and its Contents", is this the report that you were referring to?

A. Yes, sir, it is.

Cross

By Mr. Erickson:

Q. May I ask you this, Mr. Christensen, I notice by their proposed Exhibit 2, you say "Reaction of tissues and contents, general appearance, fluid yellowish, color, no solid particles, large amount of mucus." Now, according to the stomach you say there was just fluid, there was no solid food in the stomach whatsoever.

A. That is right.

Q. How long would you say that he hadn't had solid foods in his stomach? Could you ascertain that, or not?

A. No, sir, I couldn't give you even a good guess on that.

Q. You couldn't. Did you examine the stomach for alcohol contents?

A. Yes, the stomach contents, yes, were tested for alcohol.

Q. Did you find any alcohol in the stomach?

[fol. 50] A: We did.

Q. Do you know what percent you found?

A. The alcoholic content was proved to be .341 per cent by weight.

Q. What would that indicate to you?

A. Well, it would really only indicate there was alcohol present in the stomach.

Q. Considerable, is that right?

A. No, if I were——

Mr. Fenton: I think, your Honor, before this question is answered, I object to it for the form, that a basis should be laid to it as to whether or not Mr. Christensen has a comparison or a basis of knowing how much the word "considerable" implies.

Mr. Erickson: I asked him the contents. He can give it to me.

The Court: He may answer. Do you have in mind the question?

A. Yes. I can't hardly give you a respectable answer unless I compare it to something, something else. Now, if I were to compare it to alcoholic content in blood of a person who had been using, drinking alcohol, I would say it was a considerable amount.

Q. Yes.

A. If I were to say, compare it to the amount of alcohol in the stomach, I think I maybe ought to stop there. If you want more information you can ask for it.

Q. I like what you are giving me.

The Court: What do you mean by this percentage?

A. This, percentage, might be misleading, if I might [fol. 51] make another explanation.

Q. Well, just give us the amount.

A. The amount, the degree of intoxication of a person can only be measured by the alcoholic content in the blood, not in the stomach contents, that could be very misleading. Now, a person might receive a drink of alcohol and a few minutes later die and we may test and there would not be any in the blood, but we get quite a bit of the stomach contents.

Q. The alcohol comes from the stomach to the blood.

A. That is correct. I agree with that.

Q. That is not a conclusion, that is right, that is where it comes from.

A. That is right.

Q. Now, assuming that that alcohol was in his stomach, it would have to come through his mouth.

A. Yes.

Q. And lodge in the stomach.

A. That is right.

Q. Then lodge in the blood.

A. Yes, sir.

Q. Well, the indication then that he had no food down him, assuming a person is alcoholic, he can't keep solids on his stomach, is that not correct?

A. I am not sure about that.

Q. Do you think that is correct?

A. I couldn't give you an opinion on it.

Q. You couldn't give an opinion on it. Now, you say strychnine, you don't give me the content, could you tell——

[fol. 52] A. You mean the quantity?

Q. The quantity.

A. Yes.

Q. You just say a trace, of strychnine, you don't give the amount?

A. No. No determination was made for quantity.

Q. You couldn't do that, could you?

A. Yes, we could.

Q. You could give me the analysis, how much strychnine——

A. That could have been done, yes. Not requested——

Q. That wasn't done?

A. That is right.

Q. I see. Now, I will ask you, you can take so much strychnine without, you find the contents of the stomach that wouldn't be proximate cause of death, is that not true?

A. Let's see, state that again. I wasn't following the first part.

Q. The amount, the contents of the strychnine in the stomach, you analyzed it, shows a trace of strychnine. A person can live many days by taking small amounts of strychnine, is that not correct?

A. I couldn't testify as to how long a person could take traces of strychnine and still remain alive.

Q. It can be done. You have heard of cases where it has been given.

Mr. Fenton: I might object to that as hearsay, your Honor. The question should be rephrased to "Do you know of any?"

The Court: The objection is overruled.

[fol. 53] Q. Answer.

A. Now, let's see. I am not sure I remember the form of that question.

Mr. Erickson: Will you read that?

(Part of record read)

Q. Numerous tasting, an amount that won't kill a person.

A. I have heard of therapeutic doses of strychnine being given intravenously for a heart stimulant.

Q. A heart stimulant.

A. That is correct.

Q. Now, I will ask you this, Mr. Christensen again, the only thing you found was a trace of strychnine.

A. Well, I hesitate to accept that word "trace".

Q. All right, you say in your report, you say a trace of strychnine present.

A. That is right.

Q. But no amount.

A. That is right.

Q. You wouldn't be qualified to say whether this amount you found there was the proximate cause of his death, would you?

A. No, sir. I couldn't say that.

Q. You couldn't say that?

A. No, sir.

Mr. Erickson: Thank you. That is all, doctor.

Redirect examination.

By Mr. Fenton:

Q. Mr. Christensen, do you hava recollection out of your sample how much strychnine was actually left in the residue?

[fol. 54] A. Yes, I have a definite recollection.

Q. Tell us, please.

A. It is only approximate, but it was sufficient to cover the bottom of the beaker which was what I considered an appreciable amount of strychnine.

Mr. Fenton: Your Honor, at this time plaintiff wishes to offer in evidence plaintiff's Exhibit 1 and Exhibit 2, subject to defendant's objection, and there are carbons attached to each. However, it is the intention to offer in evidence only the originals.

Mr. Erickson: I have no objection to those, your Honor, so there will be no question.

The Court: Anything further before we recall the jury?

Mr. Fenton: No, your Honor.

The Court: You will recall the jury.

(Jurors and alternate, return into court. All jurors present.)

The Court: You may proceed.

Q. Mr. Christensen, I now show you what has been marked for identification as Plaintiff's Exhibit 1. Have you seen that before?

A. Yes, sir.

Q. Do you know what it is?

A. It is my report of analysis. I would say yes sir to that.

Q. Just tell us what it is, please, Mr. Christensen.

A. It constitutes my report of analysis of the sample marked "Fruit Juice in Refrigerator."

Q. Does it bear your signature?

A. It does.

[fol. 55] Q. And was it signed in your official capacity as State Chemist?

A. It was.

Q. And is that the report that you spoke of a few moments ago, Mr. Christensen, when you stated that after you run your test on that particular sample that you made a report thereon?

A. Yes, sir.

Q. Mr. Christensen, I now show you what has been marked for identification as plaintiff's Exhibit 2. Have you seen that before?

A. I have.

Q. And do you know what it is?

A. Yes, sir.

Q. Tell us what it is, Mr. Christensen?

A. It is my report of analysis of the sample marked "Stomach And Its Contents, Ray Ashdown."

Q. And is that signed by you?

A. Yes, sir.

Q. Was that signature affixed in your official capacity as State Chemist?

A. It was.

Q. Is that the report you were speaking of a few moments ago when you told us that after you had completed your examination of that particular sample that you made a report thereon?

A. Yes, sir.

Mr. Fenton: At this time, your Honor, subject to defendant's objection plaintiff wishes to offer in evidence [fol. 56] plaintiff's exhibits 1 and 2, and the exhibits there as carbons, it is the intention to offer only the originals.

Mr. Erickson: I have no objection.

The Court: They will be received.

Q. Now, Mr. Christensen, in connection with your examination of the sample that was marked as "Stomach And Its Contents", when you determined that there was strychnine therein, will you tell us from a quantitative standpoint how much strychnine there was in the sample which you tested?

A. The actual weight was not determined, but there was enough strychnine residue to cover the bottom of a fifty cubic centimeter beaker. The crystals were easily discernable with the naked eye.

Q. Now, will you tell us, Mr. Christensen, how large the bottom of a beaker of that size is?

A. It is about one inch to one and a quarter inches in diameter.

Q. And if I understand you correctly the bottom of that particular beaker was covered with strychnine crystals, is that correct?

A. That is right.

Mr. Fenton: You may cross examine.

Cross-examination.

By Mr. Erickson:

Q. This Exhibit 1, you examined that, did you not?

A. Yes, sir.

Q. And that was Exhibit 1, was the fruit juice that was marked in the refrigerator.

A. Yes, sir.

[fol. 57] Q. And that shows strychnine none.

A. That is correct.

Q. That is correct?

A. Yes, sir.

Q. You can look and see, if you want to.

A. Yes, sir.

Q. And reaction of tissue and contents, that is Exhibit 2, that was the contents of the stomach.

A. Yes, sir.

Q. And that contained the notation "Alcohol in contents .3410, is that right?

A. .341 per cent.

Q. You are correct. Now, that alcohol, that was found in the stomach.

A. That is right.

Q. That is correct, isn't it?

A. Yes.

Q. And that was the contents shown in the stomach.

A. Yes, sir.

Q. Then the other notation was "Strychnine: Present," is that right?

A. Yes, sir.

Q. Now, you also, I will ask you was there any solid foods in the stomach.

A. There was none.

Q. There was only alcohol.

A. Yes, sir.

Q. The alcohol and no solid foods, and strychnine present.

A. Yes, sir.

Q. You wouldn't mean to tell this jury that you could say [fol. 58] that strichnine was the proximate cause of his death, would you?

A. I wouldn't attempt to say that.

Q. You wouldn't attempt to say that?

A. No, sir.

Mr. Erickson: That is all.

Redirect examination.

By Mr. Fenton:

Q. Mr. Christensen, I believe on cross examination you were asked concerning whether or not the stomach had any solid particles in it. I believe that you previously testified there was some mucus present.

A. A large amount of heavy, jelly-like mucus, yes, sir.

Q. And would you tell us as nearly as you can what the consistency of this mucus was?

A. About like soft gelatine. It was rather—that is, it held together, and it was quite heavy for mucus, and cer-

tainly was not very fluid, but along with it was some fluid material.

Mr. Fenton: That is all.

Recross-examination.

By Mr. Erickson:

Q. Could you tell whether it was lemon juice or fruit juice?

A. No, sir, I didn't attempt to identify it.

Q. You could have done that if they had asked you.

A. Yes.

Q. There would be a process.

A. There would have been some tests we could have run. We would have had to identify some tissue from one of the [fol. 59] plants, microscopically in order to make that identification, and it is questionable as to whether you could have made a positive identification then even.

Mr. Erickson: Thank you, Mr. Christensen. That is all.

Mr. Fenton: Thank you. That is all.

Arch Benson, recalled as a witness by the State, further testified as follows:

Redirect examination.

By Mr. Marsden:

Q. Mr. Benson, in your former testimony I think you stated that you took packages delivered to you by Dr. Williams to the State Chemist.

A. Yes, sir.

Q. On or about July 9, 1955, did the State Chemist give you any message?

A. On the 8th.

Q. State that again.

A. On the 8th, wasn't it?

Q. On the 8th of July?

A. Yes, sir.

Q. 1955.

A. Yes, sir.

Q. And describe what the State Chemist, Mr. Christensen, delivered to you.

A. He gave me a letter, sealed envelope.

Q. What did you do with it?

A. I brought it home and took it to Dr. Williams, delivered it to Dr. Williams and Sheriff Nelson.

[fol. 60] Q. Do you know what date you delivered it?

A. On the 9th.

Q. Did he deliver you anything else?

A. I brought back the two packages that I took up.

Q. Do you know where they are now?

A. Yes, sir. They are over in the ice box in the dairy.

Mr. Marsden: That is all.

Mr. Erickson: No examination.

Dr. R. G. Williams, recalled as a witness by the State, having been previously sworn, further testified as follows:

Direct examination.

By Mr. Marsden (continued):

Q. Dr. Williams, I show you what has been marked plaintiff's Exhibit 2, or State's Exhibit 2, and ask you if you have seen that instrument before.

A. Yes, I have.

Q. And where did you see it?

A. It was given to me in a sealed envelope by Sheriff Nelson and Deputy Sheriff Arch Benson.

Q. And will you state what that is?

A. It is a certificate of analysis from the State Chemist, Mr. Christensen, concerning the stomach and contents of Ray Ashdown, and in which——

The Court: Just a moment. You had better stop there.

Mr. Erickson: We object to that as incompetent, irrelevant and immaterial.

The Court: Proceed.

[fol. 61] Q. That is the report that was delivered to you?

A. Yes, sir.

Q. By Sheriff Nelson and Arch Benson?
A. Yes, sir.
Q. I show you what has been marked as Plaintiff's Exhibit 1; and ask you if you have seen that before.
A. Yes. That also is——

The Court: Don't tell what it is.
Mr. Erickson: Delivered to you?

A. It is the report that I received.
Q. Dr. Williams, did you sign the death certificate for Ray Ashdown?
A. Yes, sir.
Q. In your professional opinion what was the cause of his death?

Mr. Erickson: I object to that as incompetent, irrelevant and immaterial. The death certificate is the final instrument.
The Court: The latter part of the objection is overruled. I doubt there has been any sufficient foundation laid yet.

Q. Did you attend Ray Ashdown at his death?
A. Yes.
Q. Did you make out a certificate of death for him?
A. Yes.
Q. What did you write in that certificate as the cause of his death?

Mr. Erickson: I object to that as incompetent, irrelevant and immaterial.
The Court: The objection is sustained.

[fol. 62] Q. Have you an opinion as to the cause of his death?
A. Yes.

Mr. Erickson: I object to that as being incompetent, irrelevant and immaterial.
The Court: The objection is overruled. The answer may stand. But before you go further refrain from answering until counsel has had an opportunity to object.
Mr. Marsden: As I understand, your Honor, he may answer that question.
The Court: He has answered that, I believe.

Q. What is that opinion, doctor?

The Court: Just a moment.

Mr. Erickson: I object to that, the opinion is incompetent, irrelevant and immaterial.

The Court: The court believes that no sufficient foundation has been laid as yet for the doctor to express an opinion.

Mr. Marsden: That is all.

Mr. Erickson: That is all.

(Court and counsel consult together privately at the bench.)

Mr. Erickson: I would like to ask the doctor,——

Cross-examination.

By Mr. Erickson:

Q. Doctor, was any autopsy performed as to his heart?

A. Yes.

Q. At the autopsy his heart was removed?

A. Yes.

Q. And what did that show?

[fol. 63] A. We removed his heart and examined it very completely, and meticulously in all of its portions and found it to be in perfect condition from a pathological standpoint.

Q. As to cerebral hemorrhage, was an autopsy performed?

A. Yes.

Q. What was the condition of it?

A. We removed the entire brain and examined it likewise, completely and meticulously for any evidence of blood clot, stroke or hemorrhage and I found it to be in perfect condition, pathologically.

Q. Now, you knew the report there, the amount of alcohol content that showed in the stomach, is that right?

A. I read the report.

Q. Did you make an analysis as to the alcoholic content, or was that the chemist alone?

A. That was the chemist alone.

Q. And in your examination of his stomach you found no solid foods in the stomach, is that right?

A. I didn't open the stomach in its entirety.

Q. In its entirety.

A. Because I wanted to preserve the contents in it. If I had opened it they would have run out and I would have lost them.

Q. You would have lost them.

A. So I didn't see any solid material.

Q. Now, when you first came there you asked him about alcohol, whether he had been drunk or not?

A. Yes.

Q. You remember that?

A. Yes.

[fol. 64] Q. And his answer was no to that?

A. Yes, sir.

Q. Now, as to the alcohol, the amount they found there, that would have to come through the mouth and then back into the blood, the alcoholic contents. You can't tell the amount of alcohol as to drunkenness and so forth only through the veins, isn't that right, when the blood reaches the alcohol,—reaches the blood, then you take these tests as to what alcoholic contents are in the blood, isn't that right?

A. We usually test——

Q. That is your test.

A. The blood alcohol for evidence of drunkenness, the blood alcohol content.

Q. Now, the indications then showing he had no solid foods in the alcohol, he had been consuming alcohol, isn't that right?

A. I wouldn't offer an opinion as to that.

Q. You wouldn't offer an opinion?

A. No.

Mr. Erickson: That is all.

Mr. Marsden: That is all, doctor.

Mr. Fenton: At this time, subject to objection from the defendant, I would like to have the witnesses released.

(Discussion)

The Court: They may be released.

[fol. 65] ARTHUR NELSON, called as a witness by the state, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Fenton:

Q. Repeat your name, please, sir.
A. Arthur Nelson.
Q. Where do you reside, Mr. Nelson?
A. Cedar City, Iron County, State of Utah.
Q. Do you have an official position in Iron County?
A. Yes, sir, I do.
Q. What is that position?
A. Sheriff of Iron County.
Q. How long have you been sheriff of Iron County, Mr. Nelson?
A. About six and a half years.
Q. Previous to that what experience have you had in law enforcement?
A. I was City Marshall in Cedar City for eighteen years.
Q. Mr. Nelson, I call your attention to the 5th day of July 1955. Did you receive a call in your official position on that day?
A. Yes, I did.
Q. What did you do when you received that call?
A. I was in my office in the County & City Building I received the call and immediately went up to the Ray Ashdown home, myself and Charles Wells, my deputy.
Q. Were you acquainted with Ray Ashdown during his lifetime?
A. Yes, sir.
Q. Were you acquainted with the defendant, Mrs. Milda Ashdown?
[fol. 66] A. Yes, sir.
Q. Previous to the 5th day of July 1955 were you acquainted with Mrs. Ashdown?
A. Yes.
Q. Where is the Ashdown home?
A. I believe it is on 400 South and 150 East.
Q. Cedar City?
A. Cedar City.
Q. And is Cedar City in Iron County, Utah?
A. Yes, sir.

Q. When you got to the Ashdown home tell us what you did.

A. Well, Mr. Wells and myself examined the home for any kind of bottles, cans or anything that might have had any poison in them.

Q. And will you tell us what you saw in your examination?

A. Well, we found some lemon—some fruit juice in the Frigidaire, was about all the liquid that we found, we thought was of any value. We took that to the County & City Building.

Q. When you arrived at the Ashdown home was Ray Ashdown still alive?

A. No, he was not.

Q. Who was at the Ashdown home when you got there?

A. There wasn't anyone inside of the house. There was the Slack boy and the Humphreys boy, boys about fifteen or sixteen years old, one at the back door and one at the front door. They said Dr. Williams had asked them to stay there and not let anyone in until the sheriff or the coroner's jury arrived.

Q. Tell us what else you observed at the Ashdown home [fol. 67] at that time.

A. Well, we observed Ray Ashdown's body in the front room laying on the davenport.

Q. Did you make a complete examination of the premises?

A. Yes, we did.

Q. Tell us what else you observed, in detail.

A. Well, we found dishes piled up in piles in a pan on a table near the stove. There was some fruit and food stuff in the Frigidaire.

Q. Was there anything unusual about the dishes or anything else?

Mr. Erickson: That is leading. Just ask him what he saw.

Mr. Fenton: I will withdraw that question.

Q. Mr. Nelson, what else did you see?

A. Well, I don't remember of anything in particular except the household goods, furniture.

Q. Did you observe the kitchen, Mr. Nelson?

A. Yes, we did.

Q. Tell us what you saw in the kitchen.

A. Well, first, we looked around the kitchen, and then we looked in the cupboards and everything, we couldn't find anything that contained any poison of any kind, and we went through the stove and shook the ashes down and took the ashes outside and combed through them and we couldn't find anything that had been thrown in the stove.

Q. Did you observe the dishes in the kitchen, Mr. Nelson?

A. Yes, we did. They were piled up a pile say this high, on the top there was an aluminum coffee cup on the top [fol. 68] with a red ring around the top of it that was setting on the top of the rest of the dishes turned upside down.

Q. Tell us whether or not the dishes had been washed, Mr. Nelson.

A. I didn't think they had.

Q. In relation to this cup you spoke about, had it been washed?

A. Yes, the cup was clean.

Q. Now, Mr. Nelson, I call your attention to the afternoon of the 5th of July 1955, did you have occasion to return to the Ashdown home?

A. Well, we went up to the Ashdown home.

Q. Who do you mean? Who was with you?

A. Myself and Arch Benson, deputy sheriff, Charles Wells, Deputy Sheriff, and A. M. Marsden, county attorney.

Q. When you got to the Ashdown home what did you do?

A. Well, there was Mrs. Ashdown was——

Q. Mrs. Ashdown?

A. Mrs. Ashdown was out in the back of the house. We drove up to the yard and got out of the automobile and shook hands with Mrs. Ashdown, and talked to her a second or two and then I asked her if she would mind getting in the car, that we would like to talk to her.

Q. And what happened?

A. And she did get in the car with us.

Q. Who was present if you recall at this time?

A. The same group, A. M. Marsden, Wells, Benson, and myself.

Q. And Mrs. Ashdown.

[fol. 69] A. And Mrs. Ashdown.

Q. Will you tell us if you can who spoke and what was said, as nearly as you can remember?

A. As near as I remember I started the conversation. I think I said to Mrs. Ashdown that we would like to talk to her a little about the case, and I asked her if she knew really what happened. She said no she didn't know what had happened. I said to her, "Well, Mrs. Ashdown, Dr. Williams seems to think that Ray has been poisoned or had some poison." "Well," she says "I didn't do it. I wouldn't even poison a rat."

Mr. Erickson: Just a minute, your Honor.

The Court: We will take a short recess.

(3:15 p. m. Jurors admonished by the court. Recess.)

After Recess

3:55 P. M.

The Court: The defendant is in court with her counsel, and the jury is excused.

Arthur Nelson resumed the witness stand and further testified as follows:

Direct examination.

By Mr. Fenton (continued):

Q. Mr. Nelson, do you remember the line of testimony that you were giving at the recess?

A. I believe I do, yes.

Q. After Mrs. Ashdown told you, "Well, I didn't do it, I wouldn't even poison a rat" who next spoke and what was said?

A. I think I said to her, "Well, Mrs. Ashdown, we are not accusing you of doing it. We are just trying to find [fol. 70] out what really did happen." I think that—I think I said that "If Ray got hold of any poison of any

kind we are trying to find out where he got it," something to that effect. I think that is what I said.

Q. And what further conversation was had at that time?

A. Well, I just told her that we wasn't trying to accuse her of anything. We were just trying to investigate and find out if there really could be anything found or run down, if there had been a mistake made of any kind.

Q. And was there any further conversation at that time?

A. Well, I think A. M. Marsden asked Mrs. Ashdown if Ray had any insurance.

Q. And what was Mrs. Ashdown's answer?

A. She said yes, she thought it was a $3,000 policy. She said that part of it was—she was a beneficiary for part of it and her oldest daughter was beneficiary for the other part. She said that Ray had paid, I think she said, $18 and some odd cents in May on the last premium.

Q. Now, did you have any conversation on that day with Mrs. Ashdown regarding her treatment that morning, her treatment of her husband prior to the arrival of the doctor that morning?

A. Yes, we asked her, Mrs. Ashdown, if Ray was sick or anything. And she said no, when he got up he didn't feel very well, when he got up, she said. She said she gave him a cup of lemon juice and put some salt in it. She also said that she gave him two glasses, I believe she said, of w[illegible]m water with salt in, but anyhow water with salt in. [fol. 71] Q. In relation to Mr. Ashdown's attack that morning, did she state when he gave him that salt water, before he was sick or after he was sick?

A. Well, that was after. After he was sick, after he had drank the lemon juice.

Q. Mr. Nelson, I now call your attention to the 9th of July, 1955, were you present at any conversation where Mrs. Ashdown was present that day?

A. Yes, I was.

Q. Will you tell us the time of day that conversation took place?

A. As near as I can remember it was about four o'clock, the afternoon of the 9th.

Q. Will you tell us who was present at that conversation?

A. There was myself, Charles Wells, Deputy Sheriff, and Patrick H. Fenton, District Attorney.

Q. And Mrs. Ashdown?

A. And Mrs. Ashdown.

Q. Will you tell us how Mrs. Ashdown came to that conversation?

A. I asked to have her come up. I went out to the cemetery and the funeral was just over and they were ready to leave and I contacted her brother-in-law, Mrs. Ashdown's brother-in-law Alf Best and I asked him if he would go up in the lead and see Stewart Murie, Stewart had Mrs. Ashdown in his car, he was a son-in-law of Mrs. Ashdown, and I asked him if he would ask Stewart to bring Mrs. Ashdown by the County & City Building, we would like to talk to her. So Alf brought word back to me that he would [fol. 72] go that way and take Mrs. Ashdown to the County and City Building.

Q. And did Mrs. Ashdown come to the County & City Building?

A. Yes. They left the cemetery and drove direct to the County & City Building.

Q. By "they" who do you mean?

A. Stewart, he had Mrs. Ashdown and Mrs. Ashdown's sister in the car, the only two that I recognized. Mrs. Ashdown and her sister got out of the car and walked up stairs and I came in at the same time from the cemetery, and I got to the parking lot just a minute after they did.

Q. Now, by the County & City Building, you mean the building in Cedar City, or where?

A. Yes, the County & City Building in Cedar City, on Lincoln Avenue, the east side of Main Street.

Q. And where did Mrs. Ashdown's sister come to in that building?

A. She came upstairs to the sheriff's office with Mrs. Ashdown.

Q. Mrs. Ashdown came right up with her?

A. Yes.

Q. Who was present when the two ladies got in the sheriff's office?

A. Deputy Sheriff Arch Benson and Deputy Sheriff Chuck Wells, and myself.

Q. And then what happened?

A. Well, they were complaining about it being hot and it was hot, so we served them a glass of lemonade, and then I asked Mrs. Ashdown if we could talk to her alone in the courtroom. And so we went into the courtroom and [fol. 73] talked with her.

Q. And who was present in the courtroom?

A. Mrs. Ashdown and myself, Charles Wells, and Patrick H. Fenton, District Attorney.

Q. Will you tell us as nearly as you can remember the conversation that took place in that courtroom?

A. Well, as I remember when I started talking to her I asked her if she had give it any more thought about where the poison might have come from that was pronounced that Ray had had or got. She said no, she didn't know anything, any more about it than she did before. I don't know whether she used them very words or not, but she intimated, she said she didn't know any more about it.

Q. Was Mr. Arch Benson, another deputy sheriff, present during this conversation?

A. No, he was out in the hallway sort of taking care of the door; there was people trying to come in and out and we tried to keep everyone out of the courtroom.

Q. And will you go ahead and tell us what was said in the courtroom, who spoke and what was said, as nearly as you can remember?

A. Well, I can remember most of the things, I believe, that I said, but I don't believe I could remember the things that you said and the things that Wells said. It is pretty hard to remember all those things.

Q. Will you tell us, sheriff, the parts of the conversation that you remember?

A. Well, I said to Mrs. Ashdown again, that the doctor still claimed that Ray had been poisoned and we would [fol. 74] like to find out what had happened and asked her if there was any chance she had made a mistake of any kind and put poison in that lemon juice and thought it was salt. And she said she didn't think so. I asked her if she knew of any poison that was around the premises of any kind.

Q. Sheriff, prior to asking Mrs. Ashdown if she had made a mistake, was Mrs. Ashdown informed as to whether or not she needed to answer your questions?

A. I don't believe at that time. I believe it was a little later on when we advised her of her—when you advised her of her constitutional rights. I don't believe it was right on the start.

Q. Pardon me for interrupting. Go ahead and tell us what happened who spoke and what was said, sheriff.

A. We had talked to her a few minutes before that, before you had explained the constitutional rights.

Q. Will you tell us as nearly as you can remember the words that were used in explaining Mrs. Ashdown's rights to her?

A. Yes, you told her you wanted to advise her of her constitutional rights, that she was entitled to an attorney, that she didn't have to answer any questions unless she wanted to, the questions that she did answer could be used against her in court if it came to court. I think that is about what you told her.

Q. Was anything said to Mrs. Ashdown about she was free to leave there if she cared to?

A. What was that?

Q. Was anything said to Mrs. Ashdown that she was free [fol. 75] to leave the courtroom if she cared to?

A. By George, I don't remember about that.

Q. And after that, sheriff, who spoke and what was said?

A. Well, I believe we talked to her about—we talked to her about whether or not she had been out of town any place in the last month or so, and she did say that they had gone over to Kanab, I think the 10th or 11th of June when her daughter got married.

Q. Yes.

A. And she told us a little about the trip, one thing and another. And she talked to us about some of her family troubles.

Q. And after that, sheriff, who spoke and what was said?

A. I believe that we asked her—I don't know whether I asked her or someone else at that time, I believe it was me though that asked her—if Ray drank all of the lemon juice that was in the cup.

Q. And what was the answer?

A. She said no, he didn't drink it all. And I asked her what became of what was left. And she said that she threw it out of the back door.

Q. Did she tell you what she did with the cup after she threw the lemon juice out of the back door?

A. Yes. She said that she washed the cup and set it on top of the dish pan.

Q. Did she tell you when in relation to the death of Ray Ashdown she threw the lemon juice out the back door and washed the cup?

A. I asked her when she washed the cup.

Q. And what was the answer?

[fol. 76] A. I asked her. She said "I washed the cup after I made the second telephone call." I said to her, I said "Well, that sounds pretty funny, Mrs. Ashdown, that you would stop and wash a cup while your husband was taking convulsions." I says "Can you tell us the reason for that?" She says, "No, I can't." A little later on she says "I guess I was excited."

Q. And what next was said and who spoke, sheriff?

A. I believe that Mr. Wells talked to her something about the cup about that time. I am not too sure. I was in and out a few times.

Q. And what is the next conversation that you remember, sheriff?

A. Well, then I asked Mrs. Ashdown again, I says, "Now," I says, "Think and see if there has been a chance that there has been a mistake made, any kind of a mistake on that poison." I says "If there has been a mistake made" I says "we should know about it and we could iron it out." And she says, "I don't know of any mistake." And I says, "Well, there is something happened and somebody should know something about it." "Well," she says "do you want me to confess to something I didn't do?" I says "No, we don't want you to confess to anything you didn't do; don't want anyone to confess to something they didn't do." And I think that was told to her at least twenty-five or thirty times during the conversation in the evening. She did bring it up several times "Do you want me to confess to something I didn't do?" She was told each time that none of us wanted her to confess to anything she didn't do.

[fol. 77] Q. And what is the next conversation as you remember it, sheriff?

A. Well, I think I said to her "Do you have any idea how that poison got in that cup?" I says "Do you think

there is any chance that Ray put it in, that Ray got hold of any poison anywhere that you know of?" And I think she said again no, that she didn't know of any. And I think I asked her about the same thing over again, that somebody must have put some poison in the cup because Ray was pronounced being poisoned." I says "Now, tell me, how did the poison get in the cup. Do you know? Can you tell me how it got in the cup?" She says "Ray put it in."

Q. Did she go into detail as to how Ray put it in?

A. I asked her how Ray put it in. I says, "What was the strychnine in?" She says "It was in a small envelope." She took her thumb and finger and held it like that. I says "Did he pour the strychnine out of the envelope into the cup?" She said yes. I said "What became of the envelope?" She says "I took it in the bedroom and threw it in the bedpan. "Well," I says, "Mrs. Ashdown, was there any liquid in that bedpan?" She said "Yes." I says "What finally became of the bedpan?" She says "I took it out the back and emptied it down the toilet hole." I says "What did Ray say at the time he took that poison?" She said "Ray told me to get rid of all the evidence and to not tell anybody about it." And so we didn't say anything at all, no one said a word to her for a minute or two; and finally I said, "Mrs. Ashdown, "I don't believe [fol. 78] that Ray put that poison in that cup. Why don't you tell us the truth about that poison and how it got in the cup." I says "Tell us the truth about it so as we can clear this thing up." She started crying and said "I will never see my children any more." And I says, "Yes, you would see your children again, Mrs. Ashdown." I says, "Your children will be taken care of." I says, "Just tell us who put the poison in the cup." She says, "I put it in." I says "How much did you put in, Mrs. Ashdown?" She says "I put in five or six grains." She says "I figured on taking it myself and decided to give it to Ray." That is about all I can remember of the conversation. She cried and sobbed quite a little after she had told us. Oh, later on, then I asked her where she got the strychnine. She hesitated for quite some time before she would tell us anything about where she got the strychnine. At that point she said "I had ought to have an attorney." "Well," I said "you have told us about everything now except the strychnine." I says "Tell us where you got the strych-

nine and we can clear it up and get this over with." So she said "Well, I got it down at Kumen Jones' farm." I says, "What was it in, what kind of a container was it in?" I believe she said it was in a can, in a bottle, a little bottle in the can, a reddish brown bottle. I asked her what she did with the bottle. She said "I broke it and threw it down the toilet hole out in the yard." She said "You may find some pieces of glass from the bottle on the floor in the toilet." And then I asked her if she wanted to see [fol. 79] her father. I says "Your father is here in the building, would you like to see him?" She said "No, I don't want to see anybody, I am too ashamed to see anybody." "Well," I says, "your father wants to see you and your sister is here." I says "You better consent to let them talk to you." But it was a few minutes after that before she decided to let them talk to her. She says "I am too ashamed to talk to anyone." Within a few minutes later she decided to let her father come in. She nodded her head when I asked her. She didn't say "Let him come in," she nodded her head. So her father and sister came in and talked to her.

Q. Sheriff, about what time was it, as nearly as you know, when Mrs. Ashdown's father and sister came into the room?

A. Well, that could have been between 9:00 and 9:30 in the evening.

Q. Sheriff, how long, in your best judgment, was it before that, how long before that, sheriff, was it that Mrs. Ashdown had admitted putting the strychnine in the cup, in your best judgment?

A. Oh, I would say it was an hour, just about an hour before that, before her folks came in, as near as I can remember.

Q. Sheriff, when did Mrs. Ashdown first ask for an attorney that afternoon?

A. What was that?

Q. The question was, when did Mrs. Ashdown first ask for an attorney that afternoon?

A. That evening she asked, after she had confessed she [fol. 80] asked, before she told us where the strychnine was, where she got the strychnine. That is when she asked, if I remember right.

Q. Did you ask Mrs. Ashdown when she got the strychnine?

A. Yes, I did. She said she got it while Ray was working for Kumen Jones on the ranch.

Q. And did she say how long ago that had been? How long before?

A. She said Ray had worked there, she said around, she said he had left there around two months, close to two months, I think, is the way she worded it.

Q. Now, sheriff, were you in the room all the time the questioning was going on?

A. No, not all the time.

Q. And did you leave the room once or more than once?

A. I left the room three different times. If the court will allow I will tell why I left.

Q. Go ahead.

A. Mrs. Ashdown had told us that they had made a trip over to Kanab around the 10th or 11th of June. We talked to her about whether she did any shopping over there or not. She said she did a little shopping. I asked her where she did it. She said she left Ray at the motel and went down to the drugstore and bought a few articles. That was before she confessed. And the reason I left the room at that time was to call the Sheriff at Kanab to have him check the drugstore to see if there had been any poison bought at the drugstore. I was out a few minutes then and I was out a few minutes when I received his call back again about an hour later.

[fol. 81] Q. Now, sheriff, there was a great deal of conversation went on this day, some of which you heard and some of which you did not. Have you told us pretty well what you can remember of it without repeating things over and over as they were repeated that day?

A. Yes, I have told about all I can remember. I can't remember what the conversation was, what you had and what Mr. Wells had and my own. It is pretty hard to remember your own conversation at times.

Q. Now, sheriff, I call your attention to the 10th of July 1955, on that day did you have further conversation with Mrs. Ashdown?

A. Yes, Mr. Wells and I visited her in the afternoon of the 10th.

Q. And what time of day was this that you visited Mrs. Ashdown on the 10th?

A. Well, it seems to me, I am not certain on that time, it seems to me like it was after noon, along the middle of the afternoon.

The Court: What was the date of the other conversation?

A. On the 40th.

The Court: I mean this other that you have been talking about, when was it?

A. On the 9th.

The Court: On the 9th?

A. Yes, the first one in the courtroom.

(Document marked for identification as Plaintiff's Exhibit 3.)

Q. Sheriff, I hand you now what has been marked for [fol. 82] identification as Plaintiff's Exhibit 3. Have you seen that before?

A. Yes, I have seen this before.

Q. And where did you first see that, sheriff?

A. I first see it in the sheriff's office in the City & County Building in Cedar City.

Q. And was a portion of that prepared under your direction?

A. Yes, it was.

Q. Would you tell us what portion was prepared under your direction?

A. All this typewritten part of it.

Q. Was the lower typewritten part prepared initially or only the upper typewritten part, or was it all prepared at the same time?

A. This was added afterwards.

Q. That is the lower typewritten part?

A. Yes, this lower type was added afterwards.

Q. Now, sheriff there is considerable ink writing on there. Do you know who put it on?

A. Yes, Mrs. Ashdown wrote the ink writing on there.

Q. And I notice that in the body of, the typewritten body of this matter, some typewritten letters or something have been changed by pen. Will you tell us what was on there originally?

A. Yes, I can. Where it says "5" here, that was an "8" and where it says "6" it was a "10".

Q. And who changed the figures 8 and 10 to the 5 and 6?

A. Mrs. Ashdown.

Q. Did you see her do that?

A. Yes.

[fol. 83] Q. Will you tell us, was there any conversation prior to Mrs. Ashdown writing on this piece of paper?

A. Well, I handed her the paper in the first place. I says "Mrs. Ashdown, read this over very carefully and see if you feel like signing it." I says, "Read it two or three times, and take your time and read it." And I think I said or Mr. Wells said, yes, Mr. Wells said, "If there is anything you want to add to that, go ahead and add to it."

Q. Was there anyone present besides Mrs. Ashdown, Mr. Wells and yourself?

A. No, just the three of us.

Q. And after Mr. Wells told her if she wished to add to it go ahead, then what happened?

A. She wrote this writing that is written with a pen.

Q. I notice here what apparently is the signature of Mrs. M. Ashdown.

A. Yes, Mrs. Ashdown wrote that.

Q. Did you see her write it?

A. Yes, I did.

Q. Was Mr. Wells present when she wrote it also?

A. Yes, he was.

Q. Was this the same date and time and place that you have told us about when you first handed this to Mrs. Ashdown?

A. Yes, it was in the County & City Building on the afternoon of the 10th.

Q. I notice above the signature of Mrs. Ashdown there is approximately three or four lines where someone has written in ink. Do you know who put that there?

[fol. 84] A. Mrs. Ashdown wrote that herself. I see her write it.

Q. Now, pertaining to that portion of the exhibit below the signature of Mrs. Ashdown, there are two and a part lines typewritten. Who placed that on there?

A. That was put on there by Charles Wells after we got the confession.

Q. I notice what apparently are signatures of yourself and Charles Wells, is that correct?

A. Yes, that is correct.

Q. Did each of you witness Mrs. Ashdown change and sign this statement?

A. Yes, we did.

Q. On the back of the statement there is in penmanship apparently, "State's Exhibit No. 1," was that on there at the time Mrs. Ashdown signed it?

A. No, that was not.

Q. And on the front I notice "Filed July 23, 1955, W. Clair Rowley, Clerk of the District Court, Iron County, Utah." Was that on there when Mrs. Ashdown signed it?

A. No, it was not.

Mr. Fenton: Your Honor, subject to exception of the defendant, we offer in evidence Plaintiff's Exhibit 3.

Mr. Erickson: It may be received temporarily for the court to look at. It wouldn't be exhibited to the jury yet, but offered to the court for this purpose and this purpose only.

Q. Now, sheriff, at the time this statement was signed by Mrs. Ashdown was she made any offer of immunity from prosecution?

[fol. 85] A. Oh, no, no. She was quite cooperative.

The Court: Just a moment. Did you understand that question, sheriff?

Mr. Fenton: I would be most happy to rephrase it, if there is any question.

The Court: Would you read the question?

(Last question read)

A. No, none whatsoever.

Q. You understand what that question means, sheriff?

A. Well, I would think it would mean that she wasn't made any promises, is that right?

Q. Was there anything stated to Mrs. Ashdown at the time she signed that statement that might be, or that might have been offered as an inducement to get her to sign it?

A. No, we just asked her in a nice pleasant way if she would like to read it and like to sign it. She wasn't influenced in any way, wasn't threatened in any way and wasn't made any promises, just merely asked her to read it, read it carefully and if she felt like signing it why sign it.

The Court: Where was that?

A. That was in the City & County Building at Cedar City, Lincoln Avenue, on the east side.

The Court: Which part of the building?

A. That was in the ladies' cell in the jail, cell block in the building.

The Court: She was then in the cell?

A. Yes, that is right.

The Court: Is that a steel cage, or just a——

[fol. 86] A. Yes, steel cage.

The Court: Who was present?

A. Charles Wells and myself and Mrs. Ashdown.

The Court: How long had she been in there?

A. She was put in I believe about, around ten o'clock the night of the 9th and this was the afternoon of the 10th.

The Court: Had she made any further request for an attorney?

A. No. No, she hadn't.

The Court: Tell me just what she said about an attorney the day before.

A. That evening when we was questioning her?

The Court: Yes.

A. She said "I had ought to have an attorney," that is the way she put it.

The Court: And then what was said?

A. Well, I told her, I said, "Well, you told us about everything now except where you got the strychnine." I says "It is a little late to get an attorney."

The Court: What did she then say?

A. She didn't ask any more for an attorney. She never mentioned one any more.

The Court: You may proceed.

Q. Sheriff, why did you wait until the afternoon of the 10th before offering this to Mrs. Ashdown to sign?

A. Well, we didn't take any written statement on the 9th. We thought we would talk to her on the 10th, she would be calm and wouldn't be excited and she would know what she was doing. We didn't want to feel like taking advantage of her.

[fol. 87] Q. Sheriff, referring to the document that was shown to you as Plaintiff's Exhibit 3, purporting to be signed by Mrs. Ashdown, who prepared the typewritten portion of that instrument?

A. Charles Wells, Deputy Sheriff.

Q. And was that prepared under your direct supervision, or what?

A. We both talked it over together. Not exactly my direct supervision. We both mutually agreed on it.

Q. And you examined it prior to its being offered to Mrs. Ashdown, is that correct?

A. Yes, I did.

Mr. Fenton: You may cross examine.

Cross-examination.

By Mr. Erickson:

Q. Sheriff Nelson, the question that was propounded to you by Mr. Fenton and also myself at the preliminary hearing, and I asked you how many times she asked for counsel. Do you remember what you said?

A. If I remember right I told you that I remembered her asking the one time.

Q. Only one time.

A. Yes.

Q. You wouldn't say she didn't ask for counsel two or three times?

A. I didn't hear her ask for counsel——

Q. You didn't hear her?

A. I didn't hear her ask but the one time.

Q. Now, you stated to the court that after she asked for counsel she had confessed everything but where she got [fol. 88] the strychnine, is that correct?

A. Yes, that is right.

Q. And you felt, like you told the court, there was no need for doing that, just as well get it over with.

A. Yes, that is the way I felt about it.

Q. You didn't heed to her request, then, did you?

A. No, we didn't.

Q. That is right?

A. That is right.

Q. Now, when you closed with your testimony you informed me and the court, the magistrate that you at no time ever advised her of her constitutional rights, it was all Mr. Fenton, is that right?

A. I think that is right.

Q. That is correct. Now, when you obtained this written confession, that was in the afternoon, that would be July the 10th that you prepared it in your office, is that right?

A. Yes, that is right.

Q. Welsh did the typing?

A. Yes, he did the typing.

Q. And you took that to her, she had been incarcerated in the jail from ten o'clock until then and you got her to sign it. You did not then, either of you, advise her of her constitutional rights, that this could be used against her, did you?

A. I don't think we did at that time.

Q. In fact you know you didn't. You told me that before.

A. I don't remember of advising her.

[fol. 89] Q. You don't remember.

A. I don't remember.

Q. And furthermore you said you didn't at any time advise her of her constitutional rights, is that right?

A. We may not. I don't think we did.

Q. You may not.

A. I don't think we did.

Q. Can you say outright "We did not?"

A. I don't think we did, at that time.

Q. Yes, now sheriff, you stated to Mr. Fenton that you questioned her. How long would you say out of the six and a half hours, or five and a half hours, that you took part in questioning her, before Mr. Welsh and Mr. Fenton?

A. Well, I will tell you, a lot of that time was spent, Mrs. Ashdown spent a lot of that time telling us about different things. It wasn't all, all that time, we wasn't all that time questioning her.

Q. How long did you question her?

A. Oh, I think we questioned her about half of the time we had her in there.

Q. About half of the time?

A. I would imagine so.

Q. And you let her rest, is that right?

A. Yes, let her talk.

Q. Let her talk?

A. Yes.

Q. All right, then you told the court that you started to question her, you don't know just how long after Mr. Fenton, after you had been questioning her,—you said it [fol. 90] was after you had been questioning her, he advised her of her constitutional rights. Is that right?

A. It wasn't long after we started questioning her.

Q. Would you say half an hour or an hour?

A. I would say around a half hour.

Q. About a half hour, you questioned her.

A. Yes, I would imagine about that.

Q. And then Mr. Fenton advised her of her constitutional rights.

A. Yes, that is right.

Q. Did he say to her, "Milda, you are entitled to a lawyer; you don't have to talk, give evidence against yourself." What did he say?

A. Yes, he told her——

Q. All right, what did he tell her?

A. He called her Mrs. Ashdown, he said——

Q. Mrs. Ashdown,——

A. "You are entitled to an attorney. You don't have to answer any questions unless you want to." He says "the questions you ask could be used against you in court if there is one."

Q. Is that all he said?

A. Well, that is about all I remember.

Q. Now, sheriff, I ask you this, you testified in the preliminary hearing, you says "she hesitated for some time before she could tell us where she got the strychnine." "Finally she said she got it down to Kumen Jones' farm. Did you save any of it, did you use it all? She says 'I used it all.' I says, 'What did you do with the container?' She [fol. 91] says 'I broke the bottle and threw it down the toilet.' That was about all she said after she confessed. We asked her if she wanted to see her father. She said no, that she was too ashamed to see anyone, and she didn't want to see anyone, but in talking to her a few moments longer we influenced her to let her father come in and see her." Is that right. You said that?

A. Well, we tried to influence her. Just as I said before she finally nodded her head, she didn't say have him come in. She just nodded her head.

Q. Nodded her head?

A. Yes.

Q. Did she tell you why she didn't want to see her father?

A. She told us several times she didn't want to see her father.

Q. She didn't want to see her father.

A. Yes.

Q. All right, "But I want to mention in the meantime when we first started to question her, Mr. Fenton, the District Attorney, advised her of her constitutional rights." Didn't you say that? In the preliminary hearing.

A. What was that again?

Q. You said this: "Mr. Fenton, the District Attorney advised her of her constitutional rights. She said she didn't want to see anyone but in talking to her a few minutes longer we influenced her to let her father come in. But I want to mention in the meantime when we first started to question her Mr. Fenton, the District Attorney, advised her of her constitutional rights."

[fol. 92] A. She wasn't asked very many questions concerning the case until she was advised. We talked to her about one thing and another.

Q. You said about half an hour.

A. Yes.

Q. Here you said, in the preliminary hearing, you said this: "I want to mention in the meantime when we first started to question her, Mr. Fenton, the District Attorney, advised her of her constitutional rights."

A. Well, we had talked to her a little while before.

Q. All right.

A. Yes, that is right.

Q. Later you told the court it was maybe fifteen or twenty minutes before she was advised of her rights.

A. Yes, that is right.

Q. Now, which is correct?

A. Well, I think it was around twenty-five or thirty minutes.

Q. Twenty-five or thirty minutes. It could have been longer, couldn't it?

A. No, I don't think it could have been any longer than that.

Q. It couldn't. You say it couldn't?

A. No, I don't think it could have been.

Q. Did you time it?

A. No, I don't think it could have been——

Q. Did you time it?

A. No, I didn't time it.

[fol. 93] Q. Then I ask you at the hearing, to impress it very much, at that time I will ask you did not Patrick Fenton, the district attorney, in your presence and in the presence of Mr. Welsh, says "I killed five men while I was in the Army and it is better to confess, I got off. If I hadn't done that," and you studied and you studied, and you said you didn't hear that statement.

A. I still say I didn't hear that statement.

Q. Would you tell the court that that wasn't said in that courtroom?

A. No, but it wasn't said in my presence.

Q. And you know it was said, don't you?

A. No.

Q. Don't you?

A. I don't know for sure that it was said.

Q. Hasn't Mr. Fenton told you he made that statement?

A. Since the preliminary hearing.

Q. Yes.

A. Yes.

Q. And you knew that?

A. No, not at the preliminary hearing.

Q. You know now it was said.

A. Yes, I know there was something to that effect, now, yes.

Q. And it would go easier on her because he did it, was that not said in that place?

A. Not in my presence.

Q. But it was said in that courtroom, you know.

A. I don't know whether it was or not.

Q. Have you talked to anyone since I quizzed you on that?

[fol. 94] A. It wasn't said in my presence.

Q. But you know it was said.

A. I don't know it was said, either.

Q. Hasn't somebody talked to you about it?

A. No, they haven't talked to me.

Q. Hasn't that been mentioned, sheriff?

A. Yes, it has been mentioned, but it has never been mentioned if she made any promises it might go easier on her, that was never mentioned to me.

Q. That was never mentioned to you?

A. No.

Q. But you hesitated for fifteen or twenty minutes, I tried to pull that out of you, but you said you couldn't remember.

A. I couldn't. That is why I hesitated.

Q. But you wouldn't say it wasn't said in your presence, you said you couldn't remember, didn't you sheriff?

A. It wasn't said in my presence.

Q. Well, but you said you don't remember, it might have been said but you don't remember.

A. I don't remember.

Q. Is that right?

A. No, I don't remember hearing it.

Q. You will correct that now—that she was not advised of her rights to have counsel and her constitutional rights until about twenty-five minutes after you questioned her——

A. After——

Q. Is that right?

A. After we had talked to her.

[fol. 95] Q. After you had talked to her.

A. Yes.

Q. And she was not advised of her constitutional rights when you and Welsh wrote this out, and you didn't tell her that could be used against her then?

A. No, I don't think we did.

Q. In fact you know you didn't?

A. No.

Q. Don't you?

A. No.

Q. When was the warrant and the complaint, when was that served on her, was that Saturday evening?

A. I would have to check the return on that, Mr. Erickson. I don't remember the exact date.

Q. At the preliminary hearing you also testified—I said "Now, sheriff, just a minute, you are sure of that, that she wants counsel?" And you said, answer, "That is when we were talking to her about where she got the strychnine.

"She did mention counsel, didn't she?

"At one time she said.

"Q. At one time?

"A. Yes, she said she——

"Q. At what time of the game was that, sheriff?

"A. That is when we were questioning her about the strychnine, about where she got it."

Is that right?

A. Yes, that is right.

Q. That is correct?

A. Yes.

[fol. 96] Q. "All right. You were questioning her about the strychnine all the time, weren't you?" sheriff?

A. This was——

Q. Well, at different times.

A. This was when we was questioning her about where she got the strychnine.

Q. All right, I am just reading:

"At different times."

"Yes."

"And she says 'I want counsel' and you broke her down, didn't you?"

"She only mentioned counsel once."

"Just answer the question, sheriff."

"She had told us everything——"

"Just answer that, sheriff, please. This is very important. How many times did she ask for counsel?"

"One time that I remember."

That is your answer, isn't it?

A. That is right.

Q. "Yes."

"Would you say it wasn't more than that, sheriff?"

"That is all I remember."

A. That is right.

Q. "You wouldn't be sure then, sheriff, that she asked several times for counsel."

"That is the only time I remember."

That was your answer, wasn't it, again? "My name was mentioned, wasn't it, sheriff?"

A. I never heard your name mentioned.

Q. You said: "I don't remember it being mentioned. [fol. 97] You remember I represented her in the Juvenile Court, don't you sheriff" at that hearing, and you said also,

"Well, but we had interviewed her long before that." That was your answer, wasn't it?

A. What was that again?

Q. I asked you this question, I said:

"Q. You remember I represented her in the Juvenile Court" over the custody of the children that they had."

A. Yes.

Q. At the hearing, "Well, but we had interviewed her long before that." You said that. You made that statement, is that right?

A. I still don't get the question there, Mr. Erickson.

Q. That was just the question that was propounded to you, sheriff?

A. I am not clear.

Q. Maybe you misunderstood it.

A. That is not clear to me.

Q. I am not trying to confuse.

A. I still don't have it clear.

Q. Then I asked you "Well, was my name mentioned?" "Not that night" you said. Is that right?

A. I never heard your name mentioned.

Q. "Now, how many times, sheriff, did that girl ask for counsel, one, two or three times?"

"I heard her ask the one time."

"Why didn't you give it to her, sheriff?"

"Well, she had told us about everything then."

"All right.

[fol. 98] "About this strychnine.

"Now, sheriff, who made this statement to the court, that you just as well confess, that one of the boys had killed four men, he got out. Who made that statement? I will ask you honestly, in fairness, if that statement wasn't made?"

"I don't remember just what statement was made along that line."

"Do you recall something was said there? In fairness to this girl, I want you to repeat that, sheriff."

"I know I never made that statement."

"Did you hear it, sheriff?"

"Not that I remember" you said.

"Sheriff, would you say that statement wasn't made by Mr. Fenton, that he killed four men, he confessed, and he got out of it. Did you, sheriff, honestly tell me that if it hurts. You can answer that, sheriff."

"I went out a few times, in and out to get a drink of water."

"I didn't ask you that, sheriff. Did you ever hear that statement made in this courtroom?"

"I don't remember hearing it."

"You don't remember. You wouldn't say that it wasn't said, would you sheriff?"

"I don't remember."

That was your testimony, is that right, sheriff?

A. Yes, I don't remember hearing it. I still don't.

Q. Well, your answer was "Well, I was trying to recall whether I heard it or not."

"You still say you didn't hear that statement?"

[fol. 99] "I don't remember."

"Did you hear anything about it. Just answer that."

"I don't remember."

"You don't remember," and so forth.

Mr. Erickson: I think that is all.

Redirect examination.

By Mr. Fenton:

Q. Sheriff, in relation to the conversation with Mrs. Ashdown on the 9th of July that you have testified about, a question has arisen when in that conversation Mrs. Ashdown was advised of her constitutional rights. Do you know whether or not, sheriff, she was advised before she was asked any questions on that day pertaining to her participation in the death of Ray Ashdown?

A. I don't think there had been much said about the death of Ray Ashdown before she was advised.

Q. And as a matter of fact, sheriff, I will try to rephrase that question, before Mrs. Ashdown was asked any questions concerning whether or not she had had anything to do with the death of Ray Ashdown, do you know where she was advised in relation to those questions?

A. Well, she was advised before she was asked any of those questions.

Q. As a matter of fact, sheriff, before the questions were taken into that field, it was a considerable period of time after she was advised, was it not?

A. Yes. That is right.

Q. Now, sheriff, I call your attention to the document that Mrs. Ashdown signed in your presence on the 10th of July, do you know whether or not this was after she had been [fol. 100] advised of her constitutional rights on the 9th of July that she signed this document? It was the next day, wasn't it, sheriff?

A. Yes, this was on the 10th.

Mr. Fenton: Yes, thank you. I think that is all your Honor. Unless the court has something to ask.

Mr. Erickson: That is all, sheriff.

The Court: I want you to present any further evidence bearing on the admissibility of this evidence you have.

Mr. Fenton: I believe we had better put Mr. Wells on the stand.

The Court: Will his testimony be similar?

Mr. Fenton: Except for one portion, it will be corroborative of the sheriff's testimony.

The Court: You had better go into that one portion.

Charles Wells, called as a witness by the State, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Fenton:

Q. Repeat your name, please, sir.

A. Charles Wells.

Q. Where do you reside, Mr. Wells.

A. Cedar City, Utah.

Q. Do you have an official position in connection with Iron County, Utah?

A. Yes, sir. I am deputy sheriff of Iron County.

Q. Did you hold this position on the 5th of July, 1955?

A. Yes, sir.

[fol. 101] Q. Have you held it at all times since that date?

A. Yes, sir.

Q. Mr. Wells, I call your attention to the 27th day of July, 1955, were you present in this courtroom at the time Milda Ashdown was arraigned in connection with this offense?

A. Yes, sir.

Q. Will you tell us as nearly as you can remember the people that were present?

A. There was Mr. Benson and myself that was sitting on the chair there with Ethel Smith who was with the Welfare Department.

Q. And was the court personnel present?

A. Yes, sir.

Q. Was the defendant present?

A. Yes, sir.

Q. Was the defendant's counsel present?

A. Yes, sir.

Q. Calling your attention, Mr. Wells, to the plea of Mrs. Ashdown, would you tell us what you heard when Mrs. Ashdown made her plea?

A. Mrs. Ashdown made her plea here in the court, her plea was not guilty. Not guilty——

Mr. Erickson: I object to that as incompetent, irrelevant and immaterial. The court at that time took her plea as not guilty and so entered it in the record.

Mr. Fenton: I believe we are entitled to have the wording actually used, your Honor.

The Court: This being in the absence of the jury the objection is overruled. He may answer.

[fol. 102] Q. Do you remember the question, Mr. Wells?

A. The plea was entered not guilty, not guily, I didn't mean to do it.

The Court: Now, just a moment, you were asked to say what she said; now don't interpret it. When you say the plea was entered, why you are talking legal language. Now, just a minute, keep that in mind, Mr. Wells. Tell me carefully if you heard what she said.

A. Yes, sir.

The Court: Can you repeat it verbatim?

A. That was the words she said in court, not guilty——

The Court: Answer my question, sheriff. Can you repeat verbatim what she said? Will you answer that yes or no?

A. Yes.

The Court: Will you now repeat what she said?

A. She says "I am not guilty, not guilty. I didn't mean to do it."

The Court: Anything further?

Mr. Fenton: No, your Honor, that is all.

Mr. Erickson: That is all.

Mr. Fenton: That is as far as the evidence goes on this particular phase.

Mr. Erickson: I would like to call a witness at this time.

The Court: Proceed.

[fol. 103] JOHN WALTER SEGLER, called as a witness by the defendant, and to the oath administered by the clerk, "Do you solemnly swear that the evidence you shall give in this case will be the truth, the whole truth and nothing but the truth, so help you God?" answered as follows: "I will do my best."

Mr. Fenton: I object to that oath, I think he should be sworn to swear the truth, not to do his best.

The Witness: I will tell the truth.

The Court: Swear the witness again.

(The clerk again administered the oath as follows: "Do you solemnly swear that the evidence you shall give in this case will be the truth, the whole truth, and nothing but the truth, so help you God?", to which the witness answered "I do.")

Direct examination.

By Mr. Erickson:

Q. State your name.

A. John Walter Segler.

Q. Where do you reside?

A. LaVerkin, Utah.

Q. How long have you resided there?

A. Oh, approximately forty-seven years.

Q. Forty-seven years. I will ask you, were you in Cedar City on July 9th?

A. Yes, sir.

Q. The day of Ray Ashdown's funeral?

A. Yes, sir.

Q. After the funeral would you state where you were?

A. Well, myself, just as soon as they taken him to the [fol. 104] cemetery, I had a little business in town to look after.

Q. Yes.

A. And so I went, and I was gone approximately, oh, I would say an hour and a half or two hours, and during the funeral services they advocated that those people that was relatives that lived out of town to be sure and come up to Mr. Rollo's place for a little, you might say a litte knick knack, or something like that.

Q. Yes.

A. I was gone anyway a couple of hours, tended to business out in Cedar City before I went up there. Well, I had a little lunch there and I——

Q. Well, let's kindly dispense with that, Walter. When did you arrive at the courthouse, about what time.

A. Well, I would say approximately five o'clock.

Q. Five o'clock. I will ask you who was at the City & County Building at Cedar City when you got there.

A. Well, when they entered the door at the foot of the stairs this Mr. Benson was at the foot of the steps and didn't figure on anybody entering there.

Q. Don't say what he figured, just tell what you did there.

A. Yes, sir.

Q. All right, just tell us then where did you go?

A. So I asked where Milda was. And they says "Up with the sheriff."

Mr. Fenton: I object to the conversation, your Honor, unless the defendant was present.

Mr. Erickson: This is just preliminary.

The Court: The answer may stand.

Q. Just shorten it as much as you can. Then what was done?

[fol. 105] A. "Well," I says, "it isn't fair to take that girl up there and question her without her father's presence or an attorney."

Q. Who was there?

A. Mr. Benson was there. He was at the bottom of the stairs.

Q. And what was said?

A. I asked him if we could go to the sheriff's office; because that is where I figured the girl was, at the sheriff's office.

Q. Who was with you?

A. Well, Mr. Hopkins, her father.

Q. Her father?

A. And I says "I am her uncle and this is her father." And I says "I don't think she has got a right to be questioned without her father's presence or some attorney."

Q. What happened.

A. And I said I would like to go to the sheriff's office. He never resisted, but we walked up the stairs and when we got to the top of the stairs there was another, either marshal or, I wouldn't be sure, but I believe it was Hoyt, I am not sure, a city marshal, I think. Of course I am not familiar with these names, I just since this came up got acquainted with them.

The Court: Wait a minute, don't talk quite so fast. The reporter has to write this down.

A. All right.

Q. Just go a little slower.

A. So when we went to the courtroom there was another fellow there, a stranger to me, I heard his name once [fol. 106] today but I can't think of it.

Q. All right, was he a police officer?

A. Wel, he was armed with a gun and in a uniform.

Q. All right.

A. I says, "Where is the girl?" And they said they was in the courtroom there."

Q. Yes.

A. And then I told them up there again that I was her uncle, and I didn't think they had a right to take her in and question her, and one of the officers, I don't know which one it was spoke up and says, "Why, she's got an attorney in there to defend her," he says, "to give her constitutional right." I says: "Is he her attorney, or who?" I says, "I didn't know anything about it until this time."

Q. Go a little slower, Walter, this reporter must get this. Then what?

A. They refused to let her father or me in to the building, or into the courtroom.

Q. You asked Sheriff Benson——

A. I told them that I thought that Mr. Hopkins, her her father, or some attorney should be in her presence. And they refused to let either of us go in.

Q. Who refused you?

A. What is that?

Q. Who refused you, do you remember?

A. Well, now, Mr. Benson was there and this Hoyt was there, and this other fellow I tell you I can't remember his name, the three of them was there, and they said "You can't go in."

[fol. 107] Q. All right, now how long did you remain in the courthouse?

A. Well, we stayed around there quite a while. And then Mr. Benson went in and come out and he wanted Mr. Hopkins and myself to ride up to the Ashdown home, he was hunting something, we rode up with him, with Mrs. Smith, Miss Smith, and we rode up to the Ashdown home and he got some can, I don't know what was in it, I couldn't see without my glasses on. We went back down, and in a few minutes he come back out again and says "You gentlemen come and go with me." We went back up and searched and he found some other can and taken it back. And they still didn't let us in.

Q. Did you ask?

A. I don't know that I asked that particular time, but I said "I still don't believe that she could be questioned in there without some assistance."

Q. Yes.

A. And at that time I heard her crying and carrying on in there.

Q. How long did you hear her crying?

A. A couple of times when I was in the hall, and I don't know how long.

Q. And you were there in the hall how long would you say, how many hours?

A. Well, in the Sheriff's office and thereabout and back and forth to Mrs. Ashdown's place, I would say we was there approximately two and a half hours, or such a matter.

Q. Did the sheriff come in and tell you how long they had had her in the room?

[fol. 108] A. Well, we asked it, I said a time or two about the layout and Mr. Nelson come out the south door and he come in the sheriff's office, he says: "I think it won't be long now until we will know what is going on." And after they had done that why my wife was there with us, and she

asked Mr. Wells here if we could see Milda, and he turned to Art Nelson when he come out of that door if we could go see Milda, and Art kind of nodded his head yes, and he says "I think it will be all right." And we asked to go see her. And we asked if all of us could go in, there was three or four of us there, four or five of us; and they let us go in. But before that, when Mr. Wells come out he looked at his watch he says "Well," he says, "it has been six and a half hours in this."

Q. Yes.

A. That is the way he said, and others heard him say it.

Q. You tried to get in before that?

A. Well, any more than, we didn't try to get in any more than I says "I don't think that they had a right to take her in and question her, without her father's presence or an attorney." I told them that several times. I don't know how many, but several times.

Mr. Erickson: That is all.

Mr. Fenton: There are no questions, your Honor.

The Court: Just a moment.

By the Court:

Q. Will you tell me again a little more slowly and as accurately as you can what you said about them letting her have an attorney, and what the officer said?

[fol. 109] A. Well, I am not sure, but it seems to me like it was Mr. Benson, it was one of them, like I said I wasn't acquainted with the men, didn't know them at the time, but they said she has got an attorney in there to advise her, and so they didn't want to let us in, because I said that I figured she needed her father's presence or an attorney. And they said, "Why, she's got an attorney in there to advise her." And that is the only answer we got, in regards to that.

The Court: Anything further?

Cross-examination.

By Mr. Fenton:

Q. Who was the officer, Mr. Segler, that told you she had an attorney in there? Was it Mr. Benson, or Mr. Hoyt, or

the fellow at the top of the stairs that you didn't know you spoke about?

A. Well, I believe it was Mr. Benson. I believe it was.

Q. Now, just a minute. Didn't this happen up at the top of the stairs?

A. It happened in the sheriff's office.

Q. In the sheriff's office?

A. That is right.

Q. Didn't you tell us Mr. Benson was downstairs?

A. That is right, but he followed us up. He went right up and each one of the marshals or sheriffs followed us into the sheriff's office and there was about three or four of them in there when we got into the sheriff's office.

Q. Now, are you sure it was Mr. Benson?

A. I would pretty near stake my life on it.

[fol. 110] Q. You are under oath. Now, do you know who it was?

A. Well, I said I wasn't acquainted with the man at that time.

Q. Well, you have identified the men and what they said. Now, is all of your testimony on the same basis, you don't know who it was and you have identified them since, maybe?

A. Well, I got acquainted with him since.

Q. Who was it that told you that she had an attorney in there?

A. I don't know. I still think it was Benson. I would stake my life on it.

Q. Do you know who it was, Mr. Segler?

A. Well, I will say yes, it was him. I didn't know the man at the time, but since I have got acquainted with him I will say it was him.

Q. Are you sure?

A. Well, I am sure.

Q. Now, wasn't it Mr. Wells when he came out?

Mr. Erickson: I object to that as repetitious, your Honor.

Mr. Fenton: This is cross examination, your Honor.

Mr. Erickson: That doesn't make any difference.

A. I don't think—no, it was Benson, because he was setting there to the side of us. This fellow here, isn't his name Benson?

Q. Wasn't it Mr. Wells?

A. No, it was Benson.

Q. Now, wasn't it Mr. Hoyt?

[fol. 111] A. No.

Q. How about this fellow whose name you don't know?

A. It wasn't him.

Q. I see.

A. What?

Q. I see. You are absolutely certain then that it was this gentleman here?

A. Well, I am positive.

Q. Well, which one of these three gentlemen over against the wall was it?

A. It was that farther one, right over there.

Q. The one next to the window on the right of Sheriff Nelson?

A. Because the sheriff and him was in with the girl at the time.

Mr. Fenton: That is all.

Mr. Erickson: That is all.

MILDA ~~HOPKINS~~ ASHDOWN, the defendant, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Erickson:

Q. Milda, will you tell the court——

Mr. Fenton: May we have the questions louder, your Honor.

Mr. Erickson: Excuse me.

The Court: Are you having the defendant called to testify in the absence of the jury——

Mr. Erickson: That is right.——

The Court: Solely on this matter?

[fol. 112] Mr. Erickson: Solely on this matter.

The Court: On the alleged confession?

Mr. Erickson: Yes, just the one question.

The Court: The record may show that the defendant is on the witness stand restricted for that purpose and not generally.

Q. Milda, will you tell the court when you were being examined by the officers what Pat Fenton told you in reference to killing those men? Tell the court, will you, please?

A. Well, he said "If you will tell us what happened, why it will go a lot easier on you. He says "I confessed and it was a lot easier on me, if I hadn't confessed I might not gotten off, I might have been facing the firing squad now."

Q. That statement was made where, Milda, and when?

A. Oh, it was in the courtroom there. Is was quite some time after I had been in there and they had been questioning me. He said that.

Q. Do you remember who was present, Milda, when that was said?

A. I am pretty sure they all was in there.

Q. You are pretty sure on that?

A. Yes.

Q. Now, you told me this story, you told me this as soon as I come over here.

A. Yes.

Q. This isn't the first?

A. No.

Q. You told me that when I talked to you?

[fol. 113] A. Yes.

Q. Before the preliminary hearing?

A. Yes.

Mr. Fenton: I object to that question, your Honor. It is entirely self-serving, and leading.

Mr. Erickson: I will leave it as is. You may cross examination her as to that.

Mr. Fenton: There are no questions, your Honor.

Mr. Erickson: That is all.

William Henry Hopkins, called as a witness by the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Erickson:

Q. Would you state your name to the court?

A. William Henry Hopkins.

Q. And you reside at Richfield, Utah?
A. I reside at 739 South 4th West, Richfield, Utah.
Q. That is your daughter there?
A. Yes, sir.
Q. How much of an education did she have?
A. Very little education.
Q. Do you remember——
A. She probably passed the seventh or eighth grade.
Q. Seventh or Eighth Grade?
A. Yes, sir.
Q. That is all the schooling she had?
A. Yes.
Q. She was married. And how old was she when she [fol. 114] was married? About. If you remember.
A. I don't remember exactly how old she was. That is beyond my memory.
Q. Was she around sixteen or seventeen?
A. She was between sixteen and seventeen years of age when she was married. Just a child like.
Q. A child. Now, Mr. Hopkins, were you at the courthouse after the funeral of Ray Ashdown?
A. I was, yes, sir.
Q. Would you tell the court what time you arrived there after the funeral? Just tell him what took place there in your own language, will you?
A. I remember, if my memory serves me rightly, I appeared there between four and five o'clock and went immediately into the sheriff's office; and there we contacted Mr. Benson, Sheriff Miller and Sheriff Bybee, and as I remember it right, I made the remark that it didn't look to me like a fair, square deal, to railroad that girl into that sheriff's office without counsel or friends of any description.
Q. What was the answer to that?
A. Well, if I remember right, I believe Mr. Benson related that she was under suspicion. And if I remember right I believe I told him that we was very sorry, that we had no—that was the first information I had to that effect that she was even under suspicion, and he informed me that she was under suspicion.
Q. Did you ask for counsel then?
A. Yes. I said "I believe that she should have an attorney in there." And I made the remark that I intended to

[fol. 115] employ you as an attorney. There was considerable confusion around there, back and forth and so forth,——

Q. Well now,——

A. As I remember right, those are the words I said.

Q. How long did you remain, Mr. Hopkins, in the courtroom?

A. Well, we were there off and on from about 5:00—I would say 4:30 to 5:00 o'clock, until approximately 9:00 o'clock.

Q. Nine o'clock.

A. And there was at intervals I was not in the sheriff's office, we accompanied Mr. Benson up to the house, Walter Segler and myself, and Mrs. —— the Welfare lady; we accompanied them, and Mr. Benson up there on two different trips during that interval, at that time.

Mr. Erickson: I think that is all, Mr. Hopkins.

Cross-examination.

By Mr. Fenton:

Q. Mr. Hopkins, actually your statement made in reference to employing Mr. Erickson was made that evening after you had talked to your daughter, and not before, is that not correct?

A. Well, now, I wouldn't be certain as to just when that remark was made, but it was made some time during that afternoon.

Q. As a matter of fact, Mr. Hopkins, that remark was made in the presence of Sheriff Nelson, Mr. Wells, myself, after you had visited your daughter in the courtroom, is that not true?

A. Well, that may be the case. I wouldn't say that it wasn't.

[fol. 116] Mr. Fenton: That is all.

Redirect examination.

By Mr. Erickson:

Q. But you asked for counsel before that.

A. Yes, I told them when I first went in there I thought that that was wrong for them to take her in there and quiz her and railroad her.

Q. Could you hear Mildred crying?
A. I could. Crying and moaning.
Q. Crying and moaning.
A. Yes, sir.
Q. All the time you were there?
A. Well, at intervals, most of the time, yes.

Mr. Erickson: I think that is all.
Mr. Fenton: That is all, thank you, Mr. Hopkins.
Mr. Erickson: That is all we have.
Mr. Fenton: That is all, your Honor.
Mr. Erickson: That is all we have, your Honor.
The Court: No further evidence on either side regarding this?
Mr. Fenton: On this particular subject.
The Court: In the absence of the jury.
Mr. Fenton: That is correct.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Will you indicate for the record what you propose to offer before the jury?
Mr. Fenton: Yes. We intend to offer before the jury as nearly as we can the same evidence from Mr. Nelson pertaining to the meeting on the 9th of July 1955, and also pertaining to the confession on the 10th of July 1955. It is quite possible we might offer corroborative testimony [fol. 117] on those two items from Deputy Sheriff Wells, pertaining to the admission or statement in court on the 27th of July at the time of arraignment.
The Court: That has no bearing on the present issue.
Mr. Fenton: No, except I think it is an issue of the same type your Honor should be advised of before the decision.
Mr. Erickson: I understood this, your Honor, I might be mistaken, this was all we had. As to my point of view, a confession should tie her in there, also a written confession. He said that is all the evidence he had.
Mr. Fenton: On this particular subject.
The Court: Do you propose to offer Exhibit 3?
Mr. Erickson: To which we will object.
The Court: What did you say?
Mr. Erickson: Of course if he offers it there will be an objection.

The Court: You will object?

Mr. Erickson: Absolutely, as to any testimony the sheriff had from four o'clock until nine thirty.

The Court: You, the defendant, want the record to show you object to all of the testimony?

Mr. Erickson: All of the testimony.

The Court: Given by Sheriff Nelson in the absence of the jury?

Mr. Erickson: That is right.

The Court: You had better make the record show your grounds of objection.

[fol. 118] Mr. Erickson: Comes now the defendant's attorney J. Vernon Erickson and objects to the proposed statement made, purported to be made by Mrs. Milda Ashdown, purporting to be Plaintiff's Exhibit 3, for the following reasons:

That the purported statement or confession was made contrary to law, for the following reasons:

That the same was made under duress without the defendant having her constitutional rights explained to her, and that same is a confession, a purported confession made not according to the constitution of the State of Utah and the United States and the rights of an accused person was violated by the officers.

Also the question as to the oral statements that were made, purported to be made by Milda Ashdown, the defendant, were contrary to the constitution of the United States, she was not advised of her constitutional rights.

Further, that it is undisputed that Patrick Fenton, District Attorney, made a statement as to her immunity if she would confess according to his statement, the statement that Milda made to the court, that in itself was an inducement and a promise, in my mind that is a violation of the rights of the accused, and she did not have legal counsel when she asked for it in both the confession, the purported oral confession and the written confession.

And we will object to any evidence that might arise out [fol. 119] of the oral agreement and also the written agreement.

The Court: The matter will be taken under advisement.

(5:45 p. m. Recess of court until August 24, 1955, at ten a. m.)

[fol. 120] Wednesday, August 24, 1955—10 a. m.

(Jurors all present. Defendant in court with her counsel.)

The Court: Before proceeding further the court believes there should be some further discussion on the legal question we were considering last night. We will therefore excuse the jury from the courtroom.

(10:04 a. m., jurors admonished by the court. The jurors retire from the courtroom.)

The Court: Regarding the discussion at the sheriff's office or at the courtroom of the City & County Building at Cedar City, the court believes we should hear the testimony of Mr. Wells. We should have his testimony presented in the absence of the jury. Is he available?

CHARLES WELLS, called as a witness by the State, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Fenton:

Q. You are reminded, Mr. Wells, that you have previously been sworn in connection with this matter.

A. Yes, sir.

Q. Mr. Wells, I call your attention to the 9th day of July 1955, were you present at a meeting in the City & County Building in Cedar City, Utah where Mrs. Ashdown was present?

A. Yes, sir.

Q. To the best of your recollection what time did that [fol. 121] meeting commence?

A. Around 4:00 p. m., the afternoon, Saturday, the 9th.

Q. Will you tell who was present, please?

A. Mr. Patrick Fenton, District Attorney, Sheriff Arthur Nelson, and myself.

Q. Mr. Wells, will you tell us as nearly as you can remember the conversation that took place that afternoon?

A. When we first entered the courtroom with Mrs. Ashdown, Mr. Nelson asked the question of whether or not that

she remembered anything that could be of any assistance to the officers.

Q. Had Mrs. Ashdown been told that her husband had died of strychnine?

A. At that time, yes.

Q. Go ahead, please.

A. Mrs. Ashdown immediately answered Mr. Nelson that she didn't know of anything that could be of any help and immediately told Mr. Nelson that Mr. Ashdown had been despondent on several occasions.

Q. And after Mrs. Ashdown made those statements what next was said?

A. Mr. Patrick Fenton advised her of her constitutional rights, and also at that time told her the difference between first degree murder and manslaughter, and even read the state statutes to her.

Q. In relation to the advice of constitutional rights, as nearly as you can will you tell us what was said?

A. Mr. Fenton advised her that at the time——

The Court: Now, just a moment, don't use that expression. Tell me what he said. When you say he advised her, [fol. 122] you see that is in the nature of interpreting——

A. Yes, sir.

The Court: I would like you to endeavor to tell what he said, if you can't state or remember the exact words, don't use those legal expressions or conclusions such as he advised her.

A. Mr. Fenton told her at the time of what her constitutional rights——

The Court: No, just say what he said.

A. That she didn't have to answer any questions——

The Court: That is better. Now you are getting at statements.

A. She didn't have to answer any questions at all; she was entitled to have her attorney there and at that time I think that was about all.

Q. And what next was said?

A. Mr. Nelson at that time, I think, asked her a question.

The Court: May I interrupt a moment. You stated a minute ago that she had been told that her husband had died of strychnine poison. Did I understand you to say that?

A. Yes.

The Court: She had previously been told that?

A. Yes, sir.

The Court: Now, will you tell me what was said about that, and who said it, and when?

A. Mr. Nelson advised her that——

The Court: Don't say advised.

A. Pardon Me. Mr. Nelson told her that the autopsy had [fol. 123] returned and her husband had died of strychnine poisoning.

The Court: You may proceed and tell me, what did she say then, if anything.

A. To her answer I don't remember. I don't think she said anything at that time.

The Court: You may proceed.

Q. Mr. Wells, after the conversation in regard to constitutional rights, who next spoke and what was said, to the best of your memory?

A. Sheriff Nelson asked her if there couldn't have been some mistake of when this liquid was taken by her husband. He asked her if she couldn't have made a mistake by putting something in the liquid besides salt. Her answer was no.

Q. Was that subject dwelled on at any great length, Mr. Wells?

A. Yes, sir. That question was asked her, to the best of my recollection fifteen or twenty times.

Q. What further conversation was there?

A. At that time I think my question consisted of the container that was used, where the container was at, the disposition of the juice——

The Court: Will you try and tell me who said what in each case.

A. I asked her, Mrs. Ashdown, about the container that was used at the time that Mr. Ashdown had been given the lemon juice.

Q. And who next spoke and what was said, Mr. Wells?

A. She described the cup as being a white enamel cup, and [fol. 124] said that she had mixed the lemon juice, had put some salt in it, had taken it down to the basement where Mr. Ashdown was sleeping and had given it to him; he had

drank half of it; she had brought the cup back up, set the cup on top of the Frigidaire at that time.

Q. And who next spoke and what was said, Mr. Wells?

A. I asked her if she—what happened to the contents that was left in the cup. Mrs. Ashdown said that she had thrown it out the back door.

Q. Who next spoke and what was said?

A. I asked her what she did with the cup at that time. She said she set the cup back on top of the Frigidaire. I asked Mrs. Ashdown then why, after she made the second phone call for the doctor, why she passed through the house, passed the doctor and her husband and went to the kitchen and rinsed out the cup and set it on top of the dishes that were in the drain board.

Q. And who next spoke and what was said, Mr. Wells?

A. There was no answer to that question.

Q. Was that question repeated?

A. Yes, sir.

Q. Was it ever answered?

A. No, sir.

Q. And then who spoke and what was said, Mr. Wells?

A. I think Mr. Nelson then was interviewing her.

Q. And do you remember what was said?

A. Not at that time, no. I left the courtroom to get some notebooks.

Q. Tell us the next conversation you have a distinct memory of, Mr. Wells.

[fol. 125] A. When I returned I asked Mrs. Ashdown again about the container, and I received the same answer.

Q. By the same answer, you mean you didn't receive an answer or what?

A. I didn't receive an answer, no, sir.

Q. And who next spoke and what was said, Mr. Wells, according to your best recollection?

A. Mr. Nelson, I think, was interviewing her at the time, and he asked the question about the cup and the container, too.

Q. And was the question answered for Mr. Nelson?

A. No, sir.

Q. And who next spoke and what was said, Mr. Wells?

A. Mr. Nelson interviewed her then.

Q. And tell us the next conversation that you have a distinct memory of, Mr. Nelson.

A. At that time Mrs. Ashdown told Mr. Nelson that Mr. Ashdown had taken this his self.

Q. Will you, as nearly as you can, tell us the words Mrs. Ashdown used?

A. Mrs. Ashdown told Mr. Nelson, myself and Mr. Fenton that Mr. Ashdown had had this strychnine in a small envelope and had mixed it in the cup his self and had asked her to destroy the envelope, to get rid of the envelope and not to tell anyone about it.

Q. And who next spoke and what was said, Mr. Wells?

A. Mr. Nelson, the sheriff, asked her at that time what she had did with the envelope. Mrs. Ashdown said that she had taken the envelope, torn it up, put it in a bed pan [fol. 126] that was in one of the bedrooms in the Ashdown home and taken it out to the outside toilet and disposed of it there.

Q. And who next spoke and what was said?

A. Mr. Nelson at that time asked Mrs. Ashdown, and I think the statement was made this way: He says "Mrs. Ashdown, you know that Ray did not mix the poisoning and take it his self."

Q. And who next spoke and what was said?

A. Mr. Nelson at that time asked her if she didn't think that that was unfair to her husband, to make a statement of that kind and he would like to know the facts.

Q. And who next spoke and what was said?

A. At that time Mrs. Ashdown told us that she had given him the strychnine, had mixed it in the cup, taken it down to the basement, had put her arm under his head, to raise his head up so that he could drink it.

Q. And who next spoke and what was said?

A. Mr. Nelson. Mr. Nelson asked her at that time where she had gotten the strychnine.

Q. And who next spoke and what was said?

A. Mrs. Ashdown, after quite an interval of time had said that she had gotten the strychnine at Mr. Kumen Jones' ranch when Mr. Ashdown worked there.

Q. And who next spoke and what was said?

A. At that time when the question was asked about where she had gotten the strychnine. I think Mrs. Ashdown asked for an attorney.

Q. And who spoke and what was said?

A. Mr. Nelson at that time asked her, he said, "We are this far along," and he asked her the question again, of [fol. 127] course, he had gotten the strychnine, and that was the answer, at Mr. Kumen Jones' place. Mr. Kumen Jones' ranch is in Cedar Valley west of Cedar City.

Q. Mr. Wells, when Mrs. Ashdown asked for an attorney was one refused her?

A. No, sir. Mrs. Ashdown at that time spoke of her father hiring her an attorney, but there was no names as to who the attorney was at the time.

Q. Now, Mr. Wells, were you present yesterday when Mrs. Ashdown was on the stand?

A. Yes, sir.

Q. Do you remember the gist of Mrs. Ashdown's conversation, of her testimony yesterday?

A. I don't recall what the question was.

Q. Pertaining to statements made by the District Attorney?

A. Yes.

Q. And were you present when anything of that nature was said?

A. Yes, sir.

Q. Will you tell us what was said?

A. Mr. Fenton made the statement as I recall being in quite a predicament at one time his self; that he was accused of killing four men and through the cooperation of the investigating officers and by telling the truth the investigating officers was of much value to him and possibly had saved him from the firing squad.

Q. Where, with relation to this conversation you have told us about did this particular conversation come in?

A. This was after, as I recall it, this was after she had been advised that her husband's death was caused by [fol. 128] strychnine poisoning, and the statute of first degree murder and manslaughter was read to her. I think that statement that you made, Mr. Fenton, then was following.

Q. Mr. Wells, was the statement made in connection with questioning about the possibility of an accident, or was it made in connection with questioning about an intentional act?

A. That was an accident, as I understood it.

Q. At the time the investigation was going into the possibility of an accident?

A. That is right.

Mr. Fenton: Now, your Honor, is there any other item the court would like gone into by Mr. Wells at this time? I believe there is one other question I should ask, your Honor.

Q. Mr. Wells, in relation to the 9th day of July or any other time, do you know of any promises or offers that were made to Mrs. Ashdown that if she would tell what happened she would not be prosecuted?

A. Not in my presence, no, sir.

Q. Mr. Wells, in relation to the 9th of July, were there other things discussed besides this alleged act that we are trying here now?

A. Yes, sir, there was several things.

Q. Tell us in general terms some of the other items you remember being discussed.

A. Mrs. Ashdown went into some details as to what her conditions were, her living conditions, and also the despondency of her husband.

Q. Did she talk about her children?

[fol. 129] A. Yes, quite some length.

Q. And there were times, Mrs. Ashdown talked at some length on various subjects other than the fact that her husband had died of strychnine?

A. Yes, sir. She was quite concerned about her children, quite concerned about her family.

Q. She talked about them?

A. Yes.

Mr. Fenton: Is there anything else the court desires to have gone into at this time, your Honor?

Q. Mr. Wells, when Mrs. Ashdown was talking about those items not concerned with this act, was she stopped from talking, or was she let talk as long as she wanted to?

A. No, sir. She was never interrupted at any time. There was no question ever forced on her.

Mr. Erickson: I object to that, your Honor, as being a conclusion. That is improper.

The Court: Since this is not before the jury the answer may stand.

Q. Mr. Wells, during this particular conversation do you know of any time, according to your best memory, that Mrs. Ashdown asked to leave the room?

A. No, sir.

The Court: Did she leave the room at any time during the period from when she first went into the courtroom until she left in the evening?

A. No, sir.

The Court: Was she offered the opportunity to leave the room at any time?

A. I don't think that I remember of a request being made [fol. 130] or the offer being made at any time, judge.

The Court: What time was it that she actually did leave the courtroom?

A. That was possibly, I would say, between 9:30 and a quarter to ten.

The Court: Did you notice the time? When you say "possibly", that doesn't help us.

A. I came out of the courtroom at 9:30, yes, sir. I noticed the time.

The Court: And had she been there continuously from about four o'clock until that time?

A. Yes, sir.

The Court: Did she leave at that time when you came out?

A. She talked with her father and her sister a while in the courtroom.

Q. After you came out?

A. Yes, sir.

The Court: Were they present at any time until about 9:30?

A. No, sir, they wasn't.

The Court: Were any of her relatives or friends present at any time until about 9:30 in the room?

A. No, sir.

The Court: Where she was?

A. No, sir.

The Court: Do you know whether they attempted to go in?

A. No, sir. I don't. I understood they were in the sheriff's office, which is just across the hall from the court-[fol. 131] room.

The Court: They didn't ask you to permit them to go in?

A. No, sir. I didn't talk to them until after I came out.

The Court: About 9:30?

A. Yes, sir.

The Court: Did you hear this statement made, or in substance or effect; did you hear Mr. Fenton say anything to this effect, or the sheriff, that "If you will tell us what happened it will go a lot easier on you."

A. No, sir, I didn't. It could have been said.

Mr. Erickson: The last statement, what did you say, it could have been said?

The Court: Was anything like that said to Mrs. Aslalown during the time she was in the courtroom?

A. Not by myself, judge, no sir.

The Court: Do you remember whether Mr. Fenton or the sheriff made any such statement?

A. I didn't hear it; no, sir.

The Court: You may proceed.

Mr. Fenton: Unless the court desires to go info some other field on another date, or something like that, that is as far as I desire to go on this particular matter.

The Court: We will let Mr. Erickson cross examine now.

Mr. Fenton: All right, sir.

The Court: You may proceed.

[fol. 132] Cross-examination.

By Mr. Erickson:

Q. Mr. Wells, you stated to the court that Patrick Fenton read the statutes to her, is that right?

A. That is true, yes, sir.

Q. Now, would you tell me, was that read aloud to her?

A. Yes, sir.

Q. What did the statute say?

A. It was defining the difference between first degree murder and manslaughter.

Q. Manslaughter?

A. Yes, sir.

Q. Now, was the constitution read to her?

A. The constitution?

Q. Her rights?

A. She had been advised of those rights before hand, Mr. Erickson.

Q. All right, what were those rights that he said?

A. Mr. Fenton advised her that she was entitled to an attorney.

Q. All right, just what did he say when he read this statute, I want you to tell me and the court.

A. As to reading of the statutes, I couldn't tell you word for word the statutes.

Q. Do you know Milda's condition? You know her mentality, don't you?

A. No.

Q. Don't you know that?

A. I couldn't say that. I have heard of her education here in court yesterday.

Q. And do you think she understood you reading the [fol. 133] statutes to her?

Mr. Fenton: Just a moment——

A. I couldn't answer——

Mr. Fenton: I object to that question, your Honor, there is no foundation as to whether or not the witness has any idea what her understanding was——

The Court: He may answer.

Mr. Fenton: It calls for a conclusion of the witness whether or not he understood it, or whether someone else understood something or not, what someone else thinks.

The Court: He may answer.

Q. Just answer that.

A. As to repeating of the statutes, it is to define the difference between first degree murder and manslaughter, Mr. Erickson.

Q. Had you had the complaint out and served her then?

A. No, not at that time, no sir.

Q. How did she know about she was charged. Did you say, "You are charged now." with manslaughter, or murder?

A. No, no——

Q. In fact—I will let you answer.

A. May I answer this in my way. I think this was described to Mrs. Ashdown——

Q. Let's just not answer your way, let's answer the way I propound the question.

A. O. K.

Q. Now, who had the statutes in there?

A. Mr. Fenton.

Q. And they explained to her before, "We are charging [fol. 134] you with murder in the first degree."

A. He didn't say that, no, sir.

Q. Why would he want to define murder in the first degree?

A. He didn't say that the woman was charged with anything.

Q. In fact, she hadn't been served.

A. That is very true.

Q. And there was no discussion of manslaughter by you, was there?

A. No.

Q. Or there was no discussion by the sheriff of manslaughter or murder?

A. No.

Q. Why, if you know, were you interpreting what murder in the first degree is, murder in the second degree, and manslaughter, when you had not filed or served her with first degree murder?

A. Mr. Erickson, I wasn't interpreting anything.

Q. No. Well, you said that is what Pat read to her, told her what it was. Did he define the penalty to her there?

A. Yes, sir.

Q. And what did he say about the penalty? Did he read that?

A. He read the penalty of manslaughter, yes, sir.

Q. Do you remember what that said?

A. Yes, I remember.

Q. What did that say?

A. The different stages of manslaughter, I think there is different sentences.

Q. Do you think she understood that, reading it to her? Would you say that?

A. As to that, I couldn't answer that.

[fol. 135] Q. Wasn't she in hysterics there?

A. No, sir.

Q. Was she crying?

A. She would sob and cry at times, yes, sir.

Q. All the time. Had she had food, do you know, from the time of breakfast? Was she offered food?

A. From the time of breakfast up until 4:00 o'clock is quite a time.

Q. You don't know.

A. She was out where she could have gotten food.

Q. Did you offer anything, any food, didn't you say "Will you have lunch? Will you eat?" Did you say that?

A. You mean after four o'clock?

Q. Yes.

A. No.

Q. You didn't?

A. No. Gave her a glass of lemonade.

Q. You gave her a glass of lemonade?

A. Yes.

Q. Did she drink that?

A. Part of it.

Q. But you actually held her. Now, who, at this hearing, Mr. Wells, who was the first that quizzed her and talked to her? Was it you, or was it the sheriff?

A. Mr. Nelson opened the interview.

Q. How long did he talk to her?

A. Oh, as to the time limit, I couldn't say.

Q. You couldn't say?

A. Couldn't say.

Q. Might have been an hour, might have been a half [fol. 136] hour, or more?

A. Or less.

Q. Or less.

A. Yes, sir.

Q. You heard him testify, didn't you? You heard his testimony here in court, didn't you?

A. Yes, I heard some of it, and some of it I didn't hear.

Q. Some of it you didn't hear?

A. Yes, sir.

Q. Now, you said she did ask for counsel. Was there anyone that spoke up and said you can get him, we will go get him for you now?

A. I think in answering that——

Q. Just answer that.
A. She did ask for counsel.
Q. And she didn't get counsel.
A. Not at that time, no, sir.
Q. Did she ever tell you, "I don't want counsel?"
A. No, that statement was never made to me.

Mr. Erickson: That is all.

Redirect examination.

By Mr. Fenton:

Q. Mr. Wells, there is one thing we should make clear. When in relation to this conversation did Mrs. Ashdown ask for counsel, before or after she had told what had happened in their home the morning of the 5th of July?
A. That was after, quite a while after.

Mr. Fenton: Is there anything else the court desires to have gone into with this particular witness?
[fol. 137] The Court: Just a minute.

By the Court:

Q. Can you tell me how it came about that Mr. Fenton read those statutes relating to murder or manslaughter and what was said before he came to reading those statutes?
A. At that time, your Honor, I think that she was asked if a mistake could have been made, at the time that this lemon juice was mixed, and if there had been a mistake made, I thing Mr. Fenton, as I understood it, described the different penalties, in case that there would have been a prosecution.
Q. And what did she say?
A. As I remember it he read the statutes to her and told her the difference, that if a prosecution, a complaint was issued against her, of what the difference of the complaints would be.
Q. Was there anything said about it would be better for her to tell what happened at that time?
A. I think she was told at that time that if there had been a mistake made, that in case of prosecution it would be a lesser degree, the crime.

Q. Is that as fully and accurately as you can tell what was said preliminary to the reading of those statutes to her?

A. Yes, sir.

Q. That is all you remember about those details?

A. Yes, sir.

Q. Will you tell me what was said before you went into the courtroom there. What was said when Mrs. Ashdown first came to the sheriff's office.

[fol. 138] A. Mr. Nelson asked her if she could come in the courtroom, that he would like to talk to her.

Q. Is that the whole statement that was made?

A. That is what I heard, yes, sir.

Q. Did he say he would like to talk to her alone?

A. Yes, sir.

Q. Her sister was with her at the time?

A. Her sister was in the sheriff's office at the time, yes, sir.

Q. Any other relatives?

A. Not at that time, no, sir.

Q. Stewart Murie brought her there. Is he a relative?

A. That is Mrs. Ashdown's son-in-law.

Q. He brought her to the sheriff's office?

A. Yes, sir.

Q. Did he come up to the office?

A. No, sir, he did not.

Q. With her?

A. No, sir.

Q. Who came up to the office with her?

A. Her sister was with her

Q. Just the two ladies?

A. Yes, sir.

Q. Did the sister ask to go into the courtroom?

A. Not in my presence, no, sir.

The Court: Anything further?

Mr. Erickson: Yes, I would like to ask him.

Recross-examination.

By Mr. Erickson:

Q. Now, at the time when Mr. Fenton was explaining [fol. 139] to her murder in the second degree, was it—I

won't try to trip you, sheriff, in any way, it was murder in the first degree?

A. Yes, sir.

Q. Murder in the second degree?

A. And manslaughter.

Q. And manslaughter. Now, sheriff, I will ask you, had you decided at that time Mr. Fenton the district Attorney who is responsible for filing informations, did he say "Milda, we are going to file charges against you for first degree murder?"

A. No, sir, that statement wasn't made.

Q. That wasn't made?

A. No, sir.

Q. And that would be on the 9th, wouldn't it?

A. That was——

Q. Did you discuss with her what sort of a complaint you were going to file against her?

A. No. She was under suspicion at the time.

Q. Just under suspicion.

A. That is right.

Q. In fact, then, sheriff, there was no decision by the officers, the District Attorney, as to what charge was going to be filed, was there?

A. Not at that time, no, sir.

Q. Because you didn't receive the complaint and it wasn't signed until the 10th day——

A. Sunday the 10th.

Q. Of July.

A. That is right.

[fol. 140] Q. You don't know then what the purpose was discussing first degree murder and so on, why they did that?

A. I didn't ask them, no, sir.

Q. And read from it.

A. No, sir.

Q. And he read from the statute first degree murder to her, second degree murder, and manslaughter, out of the statute.

A. Yes, sir.

Q. Were the statutes in the courthouse?

A. They were in the sheriff's office, yes, sir.

Q. In the sheriff's office?

A. Yes, sir.

Q. Did you go out and get the statutes, or were they already in there?

A. No, I think Mr. Fenton went out and got the statutes.

Q. Do you know whether he did or not?

A. Well, I would say yes, he did.

Q. He went and got the statutes?

A. Yes.

Q. And read them?

A. Yes, sir.

Mr. Erickson: I think that is all.

The Court: That is all.

Mr. Fenton: That is all, Mr. Wells, thank you.

Mr. Erickson: Might I talk to Mr. Benson one minute?

The Court: Yes.

(Mr. Erickson leaves the courtroom with Deputy Sheriff Arch Benson.)

[fol. 141] (10:50 a. m. Mr. Erickson and Mr. Benson return into court.)

Mr. Erickson: I think that is all, your Honor.

The Court: Mr. Fenton, your position in prosecuting the case, that it is desirable that you avoid becoming a witness, but here there is a necessity, at least in the absence of the jury, to hear your version of what went on there.

Mr. Fenton: I have no objection to taking the stand. However, if it is done, I believe my position should be clarified, that is whether or not I am disqualified to act as counsel in the matter.

The Court: The court has to consider that briefly, and I believe that even if I call you on the court's own motion to be questioned on some matters, that you would not thereby be disqualified from continuing to prosecute the case, especially if I ask you to testify in the absence of the jury. If you wish to make any observations on that, Mr. Erickson, you may.

Mr. Erickson: No, I have absolute confidence in Mr. Fenton, but the only thing is to preserve my record.

The Court: He is not volunteering to testify.

Mr. Erickson: No, not volunteering.

The Court: But the court believes we should question him on one or two matters, the court proposes to call him on one or two matters.

Mr. Erickson: I would consent to that. In case a ruling is taken to make the record, I have got to have his testi-[fol. 142] mony for a higher court, so a record is made.

The Court: I don't quite get you. There will be a record made, what he testifies to will be a part of the record, out of the presence of the jury.

Mr. Erickson: Yes.

The Court: Unless he is called, if you wish, in the presence of the jury.

Mr. Erickson: I don't want to do that unless I had to. I will consent to the motion and I will not cross examine him at all on the court's motion calling him, but there will be some reservations I might have for Milda, so there is a record made.

The Court: The court believes, Mr. Fenton, that if the court calls you, makes you a witness on its motion rather than you volunteering to become a witness, that will not disqualify you from conducting the trial nor arguing the case. It is true, for the purpose of this motion, it might disqualify you from arguing the credibility of the witness, If so we will let your associate argue as to the credibility of the witness.

Mr. Fenton: No objection, but the question under the circumstances, if it is to be read in front of the jury I shall object to it.

[fol. 143] Patrick H. Fenton, called as a witness by the court, having been first duly sworn, testified as follows:

Examination.

By the Court:

Q. Mr. Fenton, there has been some testimony that you on the—was it the 10th of July that that questioning occurred in the courtroom?

A. No, sir, on the 9th of July.

Q. The 9th of July. Referring to the testimony of the sheriff and Deputy Wells, regarding conversations with the defendant in the courtroom at the City & County Building in the afternoon or evening of the 9th of July, there was some statement made relative to the defendant being

advised that it would be better for her if she told what had happened. Was any statement like that made by you or the sheriff or Deputy Wells, to Milda Ashdown?

A. No, your Honor.

Q. Did you tell her "If you will tell us what happened why it will go a lot easier on you," in substance or effect?

A. No, your Honor.

Q. Did either the sheriff or Deputy Wells make any statement to that effect to Milda Ashdown?

A. No, your Honor, not in my presence.

Q. Now, what was said regarding some circumstance of your having been involved in some investigation and that you had avoided proceedings by telling what had happened? Was there anything said on that subject by you to Milda Ashdown that day?

A. Yes, your Honor.

[fol. 144] Q. Will you tell us what it was, as accurately as you can.

A. Yes, your Honor. Mrs. Ashdown had been asked by the sheriff several times if there was any possibility of an accident in connection with this matter, if she might possibly have got hold of some poison and put it in the glass of lemon juice thinking it was salt. And at one point during that phase of the conversation I told Mrs. Ashdown that at one time in Europe I had been accused of killing five men and that I had told the investigating officers of what had happened, and that they had helped and in effect cleared me of the charges, and that if it was an accident she might wish to tell the investigating officers what had happened. That is the conversation as nearly as I can remember it, your Honor.

Q. Now, in relation to this matter of reading the statutes as testified to by Deputy Wells, will you state what was said preliminary to the reading of those statutes?

A. Yes, your Honor. It was in line with the same phase of questioning concerning possibility of an accident; and I either got the statute or asked one of the officers to get it, I am not sure which, it was brought in at my request or else I went and got it, and it was explained to Mrs. Ashdown——

Q. Just a moment——

A. All right. Or told Mrs. Ashdown——

Q. Say who said what.

A. Yes. I told Mrs. Ashdown that as I saw the matter there was a possibility of either first degree murder or involuntary manslaughter, if she had done it, and that the [fol. 145] penalty for involuntary manslaughter was up to one year in the county jail; and that the penalty for first degree murder was, with a recommendation of leniency from the jury, either death or life imprisonment and without that recommendation a mandatory death penalty and then I read the statutes covering those particular subjects. The only conversation was first degree murder and involuntary manslaughter; there was nothing said about second degree murder or voluntary manslaughter.

The Court: You may cross examine upon the points covered by the court's questioning.

Cross-examination.

By Mr. Erickson:

Q. I will ask you, Mr. Fenton, this, you told her that manslaughter was one year in the county jail?

A. Involuntary manslaughter.

Q. Involuntary manslaughter. Did you explain the two degrees of manslaughter?

A. I explained that there were two degrees, but that in my opinion this matter was either involuntary manslaughter or first degree murder, as she was charged with it.

Q. Did you tell her that she was charged——

A. No.

Q. ——going to be charged with that?

A. No.

Q. You were not telling her what her charge would be, you were just relating your own case——

A. No.

Q. Is that right?

A. No, not correct.

Q. Well, I just wanted what you told her.

[fol. 146] A. The statement was made in connection with consideration of this specific matter.

Q. Yes.

A. And at that time the lady had not been charged.

Q. Or you didn't tell her what she was going to be charged with.

A. That is correct, no one knew what she was going to be charged with.

Mr. Erickson: I think that is all.

Mr. Fenton: Do you have anything else, sir?

The Court: Just a moment.

RE-DIRECT

By the Court:

Q. Were you present during the whole afternoon and up until 9:30?

A. Oh, I left the room at seven o'clock and made a phone call, and a good deal earlier either left the room to get the statute or asked that it be brought. I am not sure whether I left the room the earlier time or not. Outside of that I was present during the whole time until oh I would say possibly five or six minutes before Mr. Wells left.

Q. Were you present in the sheriff's office when the defendant arrived at the sheriff's office?

A. No, your Honor.

Q. When did you arrive?

A. I had arrived before Mrs. Ashdown did, and Mrs. Ashdown was not present, I went downstairs and came back up and in the meantime Mrs. Ashdown arrived and she and Mr. Wells and Mr. Nelson were in the courtroom waiting for me to come back.

[fol. 147] Q. And they talked with her in the courtroom before you arrived, do you know?

A. I think not, your Honor, there was nothing being said when I went in. I don't know that they had not.

Q. Do you know about what time it was when you went in?

A. Within a few moments after four o'clock to the best of my recollection, your Honor. The time four o'clock is approximately correct.

Q. Do you know what time it was when Mrs. Ashdown — well, first did you hear her make any statement about putting strychnine in lemon juice or lemonade?

A. Yes, sir.

Q. When was that?

A. I don't know the exact time, your Honor, I can estimate it, if you wish.

Q. Do you have a judgment as to what time it was?

A. I have a judgment in relation to the time the questioning was discontinued.

Q. Will you tell us?

A. Yes, sir. I think about an hour to an hour and fifteen minutes before the questioning was discontinued.

Q. If the questioning was discontinued at 9:30 that would be somewhere around 8:30 or 8:15.

A. That is correct, your Honor.

Q. It was not until about 8:15 or 8:30 according to your best judgment, is that right?

A. That is correct, your Honor.

The Court: Anything further?

Mr. Erickson: I have nothing further.

The Court: I believe that is all.

[fol. 148] Mr. Fenton: Thank you, sir.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Just a moment. Do you request the right to question this witness anything further on that transaction?

Mr. Erickson: No.

The Court: By what I said previously I do not mean to rule that you could not question him.

Mr. Erickson: No, I don't intend to call him and I will not before the jury, but I only want to be certain of this record which the court will pass on.

The Court: You would perhaps have the right to call him before the jury. If you call him you perhaps ought not to argue that he would be disqualified.

Mr. Erickson: I wouldn't. The only thing is the preservation of the record in case of a conviction.

The Court: The court doesn't mean to intimate that you are not at liberty to call him as a witness, if you desire to call him.

Mr. Erickson: Your Honor, I will not call him, just as long as I have this record which your Honor has to pass on.

The Court: I believe that is all.

Mr. Fenton: Thank you, sir.

(Discussion as to newspaper reporters furnishing news to newspapers regarding matters gone into by the court in the absence of jurors.)

The Court: You may argue the objections at this time, or if you have any citations that you wish to call the court's attention to you may do that.

[fol. 149] Mr. Fenton: As far as the State is concerned we will submit it to the court.

Mr. Erickson: We are willing to submit it without argument. We submit that this is a sacred right, constitutional right, for the defendant to have counsel when she asks for it. That was the stopping point in that case, she had the right, she answered that she wanted counsel. She was refused counsel at that stage of the proceedings.

Mr. Fenton: I object to that interpretation. There is no interpretation she was ever refused.

The Court: This is just in the argument.

Mr. Erickson: I am willing to stand on the statement made by all the witnesses where there was no waiver of it.

(Argument on objection by respective counsel.)

(11:45 a. m., jurors return into court. All jurors present.)

The Court: We will now recess until two o'clock p. m.

(Jurors admonished by the court. Recess of court until two o'clock p. m.)

[fol. 150] COURT'S RULING ON CONFESSION

(Wednesday, August 24, 1955—2:00 P. M.)

(Defendant in court with her counsel. Jurors absent from the courtroom.)

The Court: Regarding the question of whether the prosecution can go into the evidence which has been testified to by the Sheriff Arthur Nelson and by Deputy Wells and Mr. Fenton, the court wishes to make the following statement of its findings:

First, that there was no promise made or assurance given of any immunity from prosecution.

Second, the court finds that the defendant was advised before the statements that are sought to be introduced in

evidence were made; that she had the right to refuse to answer questions or make a statement and that she had the right to have an attorney.

Third, that the defendant did not at that time ask for an attorney, nor until after the statements offered were made, except as to certain statements made in answer to questions as to where she procured the strychnine, which questions were asked and answers made after she indicated that she should have or desired to have an attorney.

Fourth, that the defendant was questioned or interviewed by Sheriff Nelson and Deputy Wells and the District Attorney from approximately 4:00 p. m. until approximately 8:30 p. m. before she made the statements that are under question here; that she was then in the courtroom in the presence of those three officers, two peace officers and the District Attorney, and that her sister, although she came [fol. 151] with her to the sheriff's office, wasn't permitted to go into the room, nor was her father or her uncle permitted to go into the courtroom during the course of that questioning.

The court finds that there were no threats of violence or other threats made by either of the officers or by the District Attorney.

Sixth, that there was no promise made nor any assurance given of any benefit or reward, except that the District Attorney informed the defendant that if poison had been given by mistake it might make a difference between a prosecution for murder and manslaughter, and the District Attorney read to the defendant the statute relating to first degree murder and involuntary manslaughter, and informed the defendant of the penalties for those respective offenses.

The court believes that neither the method of questioning of the defendant under the circumstances shown by the evidence, nor the physical or mental distress suffered by the defendant under the circumstances shown by the evidence were severe enough to amount to compulsion as that is contemplated by the constitutional provisions or statutes which provide that a person shall not be compelled to give evidence against himself.

The court believes that the circumstances were not such as to induce the defendant to make the statement in ques-

tion herein, that is such serious statements as the statement that she had furnished or given strychnine to her husband.

The court believes that the inducing cause of the state-
[fol. 152] ment was not fear nor duress, nor compulsion, nor any promise or assurance of any reward or immunity. The court concludes that the statements made by the defendant to the officers after she stated that she desired or should have counsel are not admissible; that any inquiry as to those statements should not be made in the presence of the jury.

The court believes that the statements made to the officers prior to that time are admissible, but the court proposes to give to the jury an appropriate instruction as to its consideration of the weight and credibility of such statements. Counsel may proceed accordingly. The bailiff will call the jury.

Mr. Fenton: Before the jury comes in I wonder if the court would indicate if the ruling is intended to cover the acts of the 10th of July also, in which the written confession was solicited.

The Court: Yes. The court believes that under the conclusion just stated that Exhibit 3 would be admissible in evidence on a proper foundation being laid in the presence of the jury, as was laid in the absence of the jury before the court.

Mr. Marsden: That would be admissible?

The Court: Will be admissible if a proper foundation is laid.

Mr. Marsden: All right.

The Court: In other words, the court does not believe that the fact that the written confession was signed while the defendant was incarcerated—no, just a minute. No. [fol. 153] that would be after she had requested counsel.

Mr. Fenton: That is correct.

The Court: That that would be inadmissible under the same principle as the other statements, because of having been procured after she had indicated that she desired to have counsel.

Mr. Fenton: All right, sir.

The Court: Any statement by the defendant after that would be subject to objection and the State should care-

fully refrain from going into that in the presence of the jury.

The court requests that counsel use care to avoid any reference to those things that are excluded under the present ruling of the court. Anything further before we call the jury?

Mr. Fenton: If I understand correctly then, your Honor, we are to be permitted in relation to the 9th, up to the time Mrs. Ashdown asked for counsel, and at that time be cut off and nothing further, that anything up to that time is admissible.

The Court: Of course you will have to develop it by laying the proper foundation in your questioning before the jury.

Mr. Fenton: Yes, your Honor.

The Court: You can't admit it to the jury without appropriate questioning.

Mr. Fenton: Yes.

The Court: And the court requests that you avoid leading questions in the presence of the jury.

Mr. Fenton: Yes, your Honor.

[fol. 154] The Court: One more thing, the court rules that the testimony of Mr. Wells regarding what the defendant said at the time of her arraignment before this court is not admissible before the jury and should not be referred to.

The court believes that the statement made at the time the defendant was called upon to enter a plea should not be admitted as evidence against her.

You will call the jury.

(2:25 p. m. Jurors return into court. All jurors present.)

The Court: You may proceed.

Arthur Nelson resumed the witness stand and further testified as follows:

Direct examination.

By Mr. Fenton (continued):

Q. You are reminded that you have previously been sworn in connection with this matter and your answers are still under oath?

A. Yes, sir.

Q. Mr. Nelson, do you remember where you were with your testimony when the jury was excluded yesterday afternoon?

A. I believe it was where Mrs. Ashdown had said that she didn't do it, "I wouldn't even poison a rat."

Q. Now, what date was this conversation?

A. That was on the 5th, the afternoon of the 5th of July.

Q. And was that the afternoon of the day that Ray Ashdown passed on, or not?

A. That was the same day.

[fol. 155] Q. And who was present at this conversation that you were testifying about?

A. Deputy Sheriff Arch Benson, Deputy Sheriff Charles Wells, and A. M. Marsden, county attorney.

Q. Mrs. Ashdown?

A. And myself.

Q. And yourself?

A. And Mrs. Ashdown.

Q. Sheriff, after the statement you have just related to us, will you tell us who next spoke and what was said?

A. If I remember right A. M. Marsden asked Mrs. Ashdown if Ray had any insurance.

Q. And will you tell us who next spoke and what was said?

A. Her reply was that she believed it was a $3,000 policy and she was the beneficiary for half of it and her oldest daughter was the beneficiary for the other half.

Q. And who next spoke and what was said?

A. She continued to say that she—that they paid a premium in May, I think she said, I think it was eighteen dollars and some odd cents, I am not sure of the amount, the exact amount.

Q. And who next spoke and what was said, sheriff?

A. I am not sure.

Q. And do you remember whether or not there was any further conversation at that time and place?

A. Well, when Mrs. Ashdown stated that she didn't do it, she wouldn't even poison a rat, I said to her, I said "Well, Mrs. Ashdown, we are not accusing you of doing it." I remember saying that. I don't remember what went on from——

[fol. 156] Q. At the time of this conversation, sheriff, did you have any information that indicated how Ray Ashdown had met his death?

A. Yes, but I think I explained that to her before, when we first started the conversation.

Q. Sheriff, I call your attention to the 9th of July, 1955, were you present at a conversation on that date when Mrs. Ashdown was present?

A. Yes, I was.

Q. And where did that conversation take place?

A. That took place in the City & County Building on Lincoln Avenue, east side of Main Street, at Cedar City.

Q. And who was present at that conversation?

A. There was Charles Wells, Deputy Sheriff, myself, and Patrick H. Fenton.

Q. And Mrs. Ashdown?

A. And Mrs. Ashdown.

Q. What room in the building did that conversation take place in?

A. In the big room, the court rooom, the one they call the court room.

Q. Will you tell us how Mrs. Ashdown came to be present there at that time, sheriff?

A. I went out to the cemetery right after the funeral and I got in touch with Alf Best, he was—he is a brother-in-law to Mrs. Ashdown, and I asked Alf if he would speak to Stewart Murie and ask Stewart if he would ask Mrs. Ashdown to——

Mr. Erickson: I object to that as incompetent, immaterial, hearsay; the defendant wasn't present. That is [fol. 157] right?

The Court: The objection is sustained. The answer will be stricken and the jury is instructed to disregard that answer.

Q. Sheriff, don't tell us what was said unless Mrs. Ashdown was present. Just tell us what happened at that time.

A. Well, she did come to the courthouse after I got word to her, through Stewart.

Q. And where did she first come in to the courthouse?

A. She came in the front door, she and her sister—I don't remember her sister's name.

Q. Where did they go from there?

A. They came up to the sheriff's office.

Q. And what time of day was this, sheriff, to the best of your knowledge?

A. That would be right around four o'clock, right close to four o'clock.

Q. Who was present in the sheriff's office?

A. There was Charles Wells, Deputy sheriff, and myself, Patrick H. Fenton, Arch Benson was in the hall, out in the hall, out of the courtroom, in and out.

Q. And sheriff, when Mrs. Ashdown first came into the sheriff's office, before she went into the courtroom, who was present in the sheriff's office, if you remember?

A. There was Deputy Sheriff Arch Benson and Deputy Sheriff Charles Wells, as I remember, they were in the office at the time.

Q. And did Mrs. Ashdown go into the sheriff's office?

A. Yes. She came in the sheriff's office.

Q. And was her sister there with her?

[fol. 158] A. Yes, she was there with her.

Q. And were you present there?

A. Yes, I came in, you might say, right with them, they just came in ahead of me.

Q. Was there any conversation in the sheriff's office, sheriff?

A. Well, very little. I just asked Mrs. Ashdown if we could talk to her a little while about herself. And she consented. And from there we went on into the courtroom.

Q. Now, where is this courtroom with relation to the sheriff's office?

A. It is just across the hall on the north of the sheriff's office. The sheriff's office is on the south end of the building.

Q. Now, will you again, sheriff, tell us who was present in the courtroom?

A. There was Deputy Sheriff Charles Wells, Patrick H. Fenton, Mrs. Ashdown, and myself.

Q. And will you tell us who first spoke and what was said, sheriff?

A. I believe that I spoke first; I think that I asked Mrs. Ashdown if she had given any more thought about where

Ray had got the poison, that the chemist pronounced that Ray had been poisoned.

Q. Who next spoke and what was said?

A. Charles Wells talked to her some. I can't recall just what he said.

Q. What is the next conversation that you recall, sheriff?

A. I think I asked her again if she knew of any way that Ray Ashdown could have got hold of any poison around [fol. 159] the house, or anywhere else. And she said no.

Q. And what was the next conversation?

A. Well, I think I asked her if there would be any chance that that poison could have got in that lemon juice somehow that they didn't know about accidently. And she said she didn't think so. I might state if it isn't too late that——

The Court: Just a moment, you had better wait for a question.

Q. Is there any conversation that took place in your presence that you have neglected to tell us, sheriff, in the early part of the transaction?

A. Well, she——

Q. Will you tell us who spoke and what was said?

A. I told Mrs. Ashdown, I says, "Is there any chance, possible chance, that there has been a mistake made, accidently, or any other way?" And I says, "If there has, I wish we knew about it." And she said she didn't know of any. Well, I says, "Someone must know something about it." She says, "What do you want me to do, confess to something I didn't do?" I says "Absolutely not, we don't want anyone to confess to something they didn't do." I says, "That is the last thing we want you to do, confess to anything you didn't do."

Q. Did any of the other parties in the room have a conversation with Mrs. Ashdown in your presence?

A. Yes, Mr. Wells, the deputy sheriff, Wells, he talked some to Mrs. Ashdown. And I remember you, Mr. Fenton, talked to her.

Q. Do you remember any of the conversation between [fol. 160] myself and Mrs. Ashdown?

A. Well, not clear enough that I would be able to repeat it. It is quite a job to remember all you say yourself in these cases.

Q. All right, sheriff, what is the next conversation that you remember?

A. I believe I asked Mrs. Ashdown if Ray ever got despondent and she said yes, he did, several times. I says, "In what say?" And she says, "Well, he has told me several times that he wished he was dead." And then she went on for some time telling us about some of the family affairs, which she did right on the start too.

Q. And do you remember any further conversation, sheriff?

A. Well, I remember still asking Mrs. Ashdown if there is any possible chance that Ray could have got hold of any poison. She says not that she knew of. And later on I asked her just about the same question. And I says, "Someone had to—someone had to put the poison in that lemon juice, it is pronounced poison." I says, "How did it get in there? Can you tell me how it got in, or who put it in?" She says "Ray put it in."

Q. Will you tell us as nearly as you can remember, sheriff, her words at that time?

A. I says—oh, I says, "What kind of a container was the poison in?" She said it was in a small envelope. And I said "Did Ray put it in himself?" And she said "Yes." I says, "What did Ray say to you at that time?" She said "Ray told me not to tell anyone"——

Mr. Erickson: I object to that as incompetent, irrelevant [fol. 161] and immaterial, as a deceased person, "Ray told me"——

The Court: The objection is overruled.

A. She said "Ray told me to destroy all the evidence and not to tell anyone."

Mr. Erickson: Your Honor, I make the same objection, what Ray told her, a deceased person who is dead.

The Court: The objection is overruled. The answer may stand.

Mr. Erickson: Exception.

Q. Who next spoke and what was said, sheriff?

A. I spoke to her next. We didn't say anything for a few minutes, only looked at each other. Finally I said to Mrs. Ashdown, I said, "Mrs. Ashdown, I don't believe that Ray

put that poison in that juice." I said, "Why don't you tell us the truth about that poison and who put it in?" She says "I'll never see my children any more." "Yes," I says "You'll see your children again, that will be taken care of." I says, "Who put the poison in?" She says, "I did."

Mr. Erickson: Now, just a minute, I move to strike that from the record under the court's own ruling, going back to his testimony there, that is improper. That was the last question we solved before your Honor, was that very thing.

The Court: The objection is overruled.

Mr. Erickson: May I ask him one question, your Honor?

The Court: Yes.

By Mr. Erickson:

Q. Was this before she asked for counsel?

[fol. 162] A. Yes, that was before she asked for counsel.

Q. All right, you are sure of that, sheriff?

A. Yes, sir.

Mr. Erickson: That is all.

Mr. Fenton: You may cross examine.

Cross-examination.

By Mr. Erickson:

Q. Now, sheriff, at the preliminary hearing you testified, the question was propounded to you: "Do you know whether or not her husband had been working for Kumen Jones?"

A. Did I know whether he had been or not?

Q. Yes.

A. Yes, I knew he had been. That is, I was told he had been, by Mrs. Ashdown.

Q. And did you go down to Kumen Jones' farm?

A. Yes, I did.

Q. And did you find strychnine there?

A. No, we didn't find strychnine there.

Q. You picked up something which purported to be strychnine and you analyzed it, and found out it wasn't strychnine, is that right?

A. Yes, that is right, that is right.

Q. And you didn't find any there?

A. We didn't find any strychnine there, no.

Q. Did Mrs. Ashdown ever tell you that she went to the Kumen Jones farm herself?

A. Yes, many times.

Q. Many times she went down there?

A. Yes.

[fol. 163] Q. And you stated you sent a sample of that that you found in a can to the State Chemist, is that right?

A. Yes, we did.

Mr. Erickson: I think that is all.

Mr. Fenton: I think that is all. I might recall him for one thing, your Honor, later on. That is all now.

The Court: You may do so.

Mr. Fenton: Your Honor, there is a question I would like to ask the sheriff ahead of it, on the basis of this cross examination, call Deputy Sheriff Wells now, and then recall him.

The Court: You may both recall him later.

Mr. Fenton: All right.

The Court: Discuss the matter during the recess.

Mr. Fenton: Thank you, sheriff.

[fol. 164] CHARLES WELLS, recalled as a witness by the State, further testified as follows:

Direct examination.

By Mr. Fenton:

Q. Mr. Wells, you have previously been sworn and gave your testimony?

A. Yes.

Q. You are reminded that your answers are still under oath.

A. Yes.

Q. State your name, please.

A. Charles Wells.

Q. Where do you reside, Mr. Wells?

A. Cedar City, Utah.

Q. Do you have any official position in Cedar City, Utah

—beg your pardon. Do you have any official position in Iron County, Utah?

A. I do. Deputy Sheriff.

Q. You are deputy sheriff of Iron County, Utah?

A. Yes, sir.

Q. How long have you had that position?

A. Going on two years.

Q. Were you deputy sheriff of Iron County, Utah, on July 5, 1955?

A. Yes.

Q. Have you been deputy sheriff from that time to the present time?

A. Yes, sir.

Q. Mr. Wells, I call your attention to the 5th day of July, 1955, did you have occasion to visit the Ashdown residence in Cedar City, Utah?

A. Yes.

[fol. 165] Q. When did you first go there?

A. We received a call at 11:45 a. m.

The Court: Will you be careful and limit your answers to the scope of the questions?

A. Yes, sir.

The Court: When you are asked what you did, don't say what "we" did.

A. Yes, sir.

Q. To the best of your knowledge, Mr. Wells, when did you actually arrive at the Ashdown residence, as nearly as you know?

A. 11:48 a. m.

Q. Will you tell us what you saw?

A. There was a boy at the front door and a boy at the back door of the place. We just talked to them a few minutes and entered the residence of Mr. and Mrs. Ray Ashdown.

Q. Will you describe what you saw there?

A. Mrs. Ashdown was in the living room, as he had passed away, he was laying on the overstuffed. We were requested to examine the house for poison, poisons of any kind——

The Court: Just a moment——

Mr. Erickson: I object to that.

The Court: That answer will be stricken and you are instructed to keep your answers within the scope of the questions.

Mr. Erickson: Furthermore, it is prejudicial.

The Court: Don't volunteer. The last answer will be stricken, and the jury is instructed to disregard it.

Q. Tell us what you saw, Mr. Wells, as you went through [fol. 166] the house.

A. We saw Mr. Ashdown's body, and——

Q. What room was that in?

A. That was in the living room.

Q. Tell us what else you saw in that room.

A. There was a dining room table there, some cereal, milk, was setting on it.

Q. When you left the room Mr. Ashdown's body was in, where did you go?

A. To the kitchen.

Q. Will you tell us what you observed there?

A. There was a kitchen stove, some dishes, some unwashed and some that was washed, kitchen cupboards, the ordinary kitchen equipment was in it.

Q. Will you tell us the dishes you observed to be washed?

A. There was——

Mr. Erickson: I object to that, your Honor, as leading, all those questions. Just let him answer, such as dishes. Ask him as to what he observed. He can tell. Then comes back to the dishes.

The Court: That objection is overruled.

A. There was some dishes in the dishpan that hadn't been washed——

The Court: Just a moment.

(Discussion as to opening and closing windows.)

The Court: You may proceed.

Q. Do you remember the question, Mr. Wells?

A. Yes, there was some unwashed dishes in a dishpan setting here and some of them had been washed and was on the drain board.

[fol. 167] Q. And will you tell us any specific dishes you noted on the drain board?

A. They were cups and saucers, dishes, plates, that had been washed. On top of the dishes was a white enamel cup turned upside down, laying on top.

Q. Will you describe that cup as nearly as you can?

A. It wasn't a large cup, it is an ordinary white enamel cup with a red ring around the top.

Q. And where did you say that cup was?

A. That cup was on top of the dishes, turned down, on the drain board.

Q. And will you tell us, if you know, whether that cup was washed or unwashed?

A. That cup was, at that time, was washed, turned upside down on top of the dishes to dry.

Q. Tell us what next you did and what you saw, Mr. Wells.

A. We examined the premises and the outside grounds.

Q. And what else did you see?

A. We found some fruit juice in the Frigidaire and one lemon with the end cut off of it.

Q. All right, sir. Mr. Wells, tell us, if you know, how long you were at the Ashdown residence that morning.

A. I judged we was there an hour and a half.

Q. Did you return to the Ashdown resjdence later that day?

A. Yes, sir, about 2:30 in the afternoon.

Q. What did you do?

A. There was, Mr. Nelson, the sheriff, Mr. A. M. Marsden, the county attorney, Mr. Arch Benson, deputy sheriff, and myself, that went to the Ashdown home, drove to the back yard; Mrs. Ashdown was in the back yard at the time, [fol. 168] Mr. Nelson asked her if she wouldn't get in the car, as he would like to talk to her.

Q. This was in Mrs. Ashdown's presence?

A. Yes.

Q. Did Mrs. Ashdown get into the car?

A. Yes; I got out of the front seat, got in the back seat, Mrs. Ashdown got in the front seat with Sheriff Nelson.

Q. And at that time who was present besides you and Mrs. Ashdown?

A. Sheriff Nelson, Arch Benson, deputy sheriff, A. M. Marsden, county attorney, and myself.

Q. Who first spoke and what was said?

A. Sheriff Nelson asked Mrs. Ashdown if she knew of anything that happened there that she knew of that would cause Ray's death.

Q. Who next spoke and what was said?

A. Mr. Nelson told her that he had—if there was anything that he could do to help he was there to help, and Mrs. Ashdown said there wasn't a thing that she knew of at the time, then Mr. Nelson asked her about whether she had any insurance or whether Ray had any insurance or not. She answered the question yes, and said that there was a $3,000 policy and she was beneficiary for half of it and the oldest daughter Beverley was the other beneficiary for the other half. And as to her knowledge she had made a payment or Ray had made a payment in May totaling eighteen dollars and something.

Q. And who next spoke and what was said, Mr. Wells?

A. May I correct that? I think Mr. Marsden asked that question, instead of Mr. Nelson.

[fol. 169] Q. And who spoke next, and what was said?

A. That was about all I remember the questions that afternoon.

Q. About how long did that conversation last, Mr. Wells, to the best of your knowledge?

A. Oh, I would judge we were there twenty minutes, twenty-five minutes.

Q. Mr. Wells, I call your attention to the 9th of July, 1955, were you present at a conversation where Mrs. Ashdown was present on that date?

A. Yes, sir.

Q. Where did that conversation take place?

A. At the City & County Building on the second floor, in Cedar City, Utah, in the courtroom.

Q. Where did you first see Mrs. Ashdown that day?

A. Mrs. Ashdown came to the sheriff's office about four o'clock in the afternoon with her sister.

Q. And who was present at that time?

A. Mr. Nelson, Arch Benson, and myself.

Q. And was there any conversation in the sheriff's office?

A. Mr. Nelson asked Mrs. Ashdown if he could talk to her privately in the courtroom, by herself.

Q. And what was the answer?

A. She agreed, and Mr. Nelson and her went in the courtroom together.

Q. Where did you next see Mrs. Ashdown?

A. In the courtroom, Mr. Nelson, Mr. Patrick Fenton, and myself.

Q. And Mrs. Ashdown?

A. That is right.

[fol. 170] Q. How long was this after Mrs. Ashdown was in the sheriff's office?

A. Possibly five minutes.

Q. And was there any conversation in the courtroom?

A. Yes, sir.

Q. Tell us who spoke first and what was said.

A. Mr. Nelson asked Mrs. Ashdown at that time if she remembered anything that could be of any help to the investigating officers. And at that time her answer was no. She did discuss at length the despondency of her husband. And at that time she did tell Mr. Nelson, and myself and Mr. Patrick H. Fenton that Mr. Ray Ashdown had been despondent for quite a while, had made the remark several times he wished he was dead.

Q. And who next spoke and what was said, Mr. Wells?

A. Mr. Nelson, I believe, asked Mr. Fenton to advise Mrs. Ashdown of her legal rights.

Q. Who spoke and what was said, Mr. Wells?

A. Mr. Fenton advised Mrs. Ashdown——

Q. Tell us specifically what was said, Mr. Wells.

A. Mr. Fenton told her that any question that was asked her, that she did not have to answer; that she was entitled to an attorney, and that any question that she did answer could be used against her.

Q. What next was said, and who spoke, Mr. Wells?

A. Mr. Nelson, I think, questioned Mrs. Ashdown as to the container that was used to mix this lemon juice.

Q. What did he say when he asked her that?

A. He asked Mrs. Ashdown at the time if she had mixed the lemon juice or Ray had mixed the lemon juice, and [fol. 171] Mrs. Ashdown's answer was that she had mixed the lemon juice.

Q. Who next spoke and what was said?

A. And had put salt in it at that time.

Q. Had put salt in it, did you say?

A. Had put salt in the lemon juice.

Q. And who next spoke and what was said?

A. Mr. Nelson then asked her whether she had taken this lemon juice and given it to her husband. She said yes, that she had taken the lemon juice, taken it to the basement where Mr. Ashdown was in bed at the time; she had put her hand under the back of his head, raised his head up, that he had drank half of the contents of the cup, of the lemon juice. She returned to the kitchen and set the contents, the balance of the contents of the lemon juice on top of the Frigidaire. Mr. Nelson then asked Mrs. Ashdown what she had did with the balance of the lemon juice that was in the cup. Mrs. Ashdown's answer was that she had thrown it out the back door.

Q. Who next spoke and what was said, Mr. Wells?

A. Mr. Nelson questioned Mrs. Ashdown about the telephone calls that she had made to the doctor. To the best of my memory I think that her statement was that she made two, two telephone calls to Dr. Williams.

Q. And who next spoke and what was said?

A. I asked Mrs. Ashdown at the time about the container of the lemon juice and why that she had, upon the second call that she had made to Doc Williams, and when Dr. Williams had arrived at the house, and Dr. Williams and Mrs. Ashdown was in where Mr. Ashdown was at, at the time——

[fol. 172] Mr. Erickson: I object to that. That is the first time you were there, wasn't it?

A. I beg your pardon?

Mr. Erickson: This is, you are talking about not in the courthouse, but in the home.

The Court: Are you telling us what you said, or are you telling us something about what had happened?

A. I am telling you about the interview——

The Court: Are you telling what you were saying?

A. Yes, sir.

Mr. Erickson: That is what I want to know.

A. Yes.

Q. Go ahead.

A. The interview that I had with Mrs. Ashdown——

Q. Tell us what you said, Mr. Wells.

A. I asked Mrs. Ashdown about the container, what she had did with the container, when she had placed the container on top of the Frigidaire; then I asked her why that she had came in the house with Dr. Williams, went out into the kitchen, washed and rinsed the cup that the lemon juice was mixed in, and laid the cup on top of the dishes that were in the draining board.

Q. What was Mrs. Ashdown's answer?

A. There was no answer.

Q. Did you ask that question once or more than once?

A. I asked that question ten or fifteen times.

Q. Was it answered for you at any time?

A. No, sir.

Q. Who spoke next and what was said?

A. Mr. Nelson; I believe, questioned Mrs. Ashdown, I [fol. 173] think at that time he asked Mrs. Ashdown about the contents of the cup, the lemon juice, and if she knew at that time how that this strychnine was put in the cup.

Q. And who next spoke, and what was said?

A. Mrs. Ashdown at that time made the statement that her husband Ray had poured the strychnine in the lemon juice and had asked her to destroy the envelope that the strychnine was in and not to tell anyone about it.

Q. Who next spoke, and what was said, Mr. Wells?

A. Mr. Nelson at that time asked Mrs. Ashdown, he told Mrs. Ashdown that he didn't believe that that was the truth, that he didn't think that Ray had mixed the strychnine in the lemon juice; therefore, he asked Mrs. Ashdown to tell him the truth about who put the strychnine in the lemon juice, and Mrs. Ashdown answered him, "I did."

Mr. Fenton: You may cross examine.

Cross-examination.

By Mr. Erickson:

Q. Now, you tell the jury and the court that you were in the courtroom, that it was four o'clock on the 9th of July, is that right?

A. That is correct.

Q. And you stayed continuously with her in that courtroom until 9:30, is that right?

A. With one exception. I left the courtroom to pick up a notebook, Mr. Erickson.

Q. About how long were you gone?

A. Oh, at that time I did stop to get a drink of water, to possibly five or ten minutes.

Q. Five or ten minutes?

[fol. 174] A. Yes, sir.

Q. And that is all you were out of that courtroom?

A. About that, I would say.

Q. And Mildred had been to the funeral and she had come there to the courthouse. That is correct?

A. Yes, sir.

Q. About four o'clock?

A. Yes, sir.

Q. And you, the sheriff, and Patrick Fenton, and, Mr. Wells, there were three of you, is that right?

A. That is correct.

Q. Present?

A. Yes, sir.

Q. And who first started to question Mildred?

A. Mr. Nelson.

Q. How long did he question her?

A. When Mr. Nelson started, as I will repeat that again, that Mrs. Ashdown went into quite a story about the despondency of her husband, Mr. Erickson.

Q. All right.

A. And after that was over Mr. Nelson asked Mr. Fenton there to tell the women what her rights were, her constitutional right.

Q. Her constitutional rights?

A. That is true.

Q. And you told the court now, and the jury now, that he advised her, what she said would be used against her.

A. That is right.

Q. Today, under oath in this court you said that you heard Patrick Fenton pick out the statutes and read [fol. 175] to her the statutes, what murder was in the first degree, murder in the second degree, and manslaughter.

A. Not the second degree, I said——

A. All right, and manslaughter.
A. First degree and manslaughter.
Q. And manslaughter.
A. That is correct.
Q. You were reading to her her constitutional rights there, weren't you?
A. Not me, I wasn't doing the reading.
Q. He was, he read the statute to her.
A. That was later on.
Q. That was later on?
A. Yes, sir.
Q. Now, you heard Mr. Nelson testify that her constitutional rights—it was twenty minutes or so after you started your testimony here in court.
A. As to that, I would say it was about a fifteen minute conversation with Mrs. Ashdown there about the despondency of her husband.
Q. There was nothing said about that.
A. There was no direct questions asked——
Q. The first question that was propounded to her was propounded by the sheriff, and not you, wasn't it——
A. That is right.
Q. When you started.
A. That is right.
Q. And you heard the sheriff testify such, didn't you?
A. Well, he was the first——
Q. Yes.
[fol. 176] A. The first one asked——
Q. Yes, asking questions.
A. Yes.
Q. And one question alone you said you asked her fifteen or twenty times about the container.
A. Yes.
Q. Was that interrupting his conversation?
A. No, not necessarily.
Q. Not necessarily. Were you both talking to her?
A. At times, yes.
Q. All right, now, when did Patrick Fenton inform her of her constitutional rights?
A. When she was through telling about the despondency of her husband.

Q. Do you mean to say that was the first thing that was said in that room, she talked about the despondency of her husband?

A. That is the first thing that I heard her say, and I was there to start——

Q. Didn't you hear him talk to her first, as the sheriff told you, when he said to her, this conversation——

A. Mr. Nelson——

Q. Didn't you hear——

A. Mr. Nelson asked her——

Q. Didn't you answer? Didn't you hear the sheriff testify——

Mr. Fenton: I object to the line of examination, your Honor. The witness has attempted to answer the question.

Mr. Erickson: He hasn't. I will ask him.

Q. I will make it clear. When you came into that room, [fol. 177] did not the sheriff talk to her first and started to question her——

A. The question——

Q. He stated——

A. The question as I testified to that Mr. Nelson made——

The Court: Just a moment, will you answer this question?

Mr. Erickson: Please answer.

A. Repeat your question again, please.

(Part of record read, as follows: "I will make it clear. When you came into that room, did not the sheriff talk to her first and started to question her.")

A. Yes, he talked to her first, yes.

Q. He then asked her what questions first, you heard him testify?

A. I can testify as to what he asked her.

Q. What did he do first?

A. He asked her at the time if there was anything that she had thought of that could help the officers out in any way.

Q. That was the first thing that was said, wasn't it?

A. That was the first question.

Q. It wasn't her despondency, was it, now?

A. That was when——

Q. Now, just answer that please, you have got to do that. Did you first say that, it was not the despondency first?

A. No, that was the first question I answered you, Mr. Erickson, yes, that was the first question that was asked her.

Q. That the sheriff asked her?

[fol. 178] A. That the sheriff asked her, yes.

Q. And then he talked to her at least ten or fifteen minutes first, didn't he?

A. No, sir.

Q. How long?

A. No, that was——

Q. How long?

A. I wouldn't say that, she done the talking——

Q. Just answer. How long?

A. She done the talking from then on.

Q. How long was he, can't you tell me how long was he questioning her, about, now, if there is any more to say——

A. That question would have taken about two minutes.

Q. Two minutes?

A. Yes.

Q. Would you tell the court and the jury that he only talked to her two minutes?

A. The first question he asked her.

Q. Yes, two minutes?

A. Yes.

Q. And then she started on the despondency?

A. That is correct.

Q. Now, when did you make that statement before, two minutes?

A. Well, that is all it would take.

Q. That is not what I am asking you. You heard the sheriff testify, didn't you, and what he said, didn't you? You were in the courtroom?

A. He said fifteen or twenty minutes.

Q. Yes. You said two.

[fol. 179] A. I would say it would take about two minutes to ask that question.

Q. Yes. The sheriff said twenty. Do you want to correct yourself on that?

A. No, sir, that is the way that——

Q. You understood it.

A. That is the way that I understood it.

Q. Yes. And you kept Milda in there, the three of your, questioning her, reading the statutes to her and defining manslaughter and murder, and she wasn't even charged with murder, isn't that the truth?

A. There had been no charges made at that time.

Q. You didn't know what the charges would be, did you?

A. No, sir; I did not.

Q. Certainly. And now you come back and say he advised her of her constitutional rights, and today he was reading the statutes. Now, which was it?

A. That was later on——

Q. Oh.

A. He advised her of her constitutional rights.

Q. That was later on.

A. I think——

Q. Do you know what time that was?

A. No.

Q. How many hours?

A. I don't recollect the time, no, sir.

Q. How many hours?

A. I wouldn't say.

Q. Two?

A. I wouldn't say that.

[fol. 180] Q. Be three?

A. I wouldn't say that.

Q. Couldn't you guess at that, like you could the two minutes?

A. No. There was too much conversation, and too many questions.

Q. Too much conversation. In fact, you don't know what went on, do you, and who talked, and in the order?

A. I definitely know what I said; yes, sir.

Q. Yes, you know what you said?

A. You bet you.

Q. But yet you were there six or seven hours, or six and a half hours. How many would you say?

A. Oh, I would say not more than five and a half.

Q. Not more than five and a half?

A. No.

Q. Had food. Did she have anything to eat?

A. No. Or I didn't either.

Q. You didn't either

A. No, sir.

Q. Did you have any lemonade?

A. She did. I didn't.

Q. You got her that?

A. Yes, sir.

Q. I see. Did you hear the statement that Patrick Fenton made to her about—when you were there, about killing some people? Would you repeat that again, what you repeated today to the court?

A. Yes, sir, be more than glad to.

Q. Yes, I want you to.

[fol. 181] A. Mr. Fenton at that time told Mrs. Ashdown that he had an experience and was charged at that time with killing four men, I think, in Europe, and he had cooperated with the investigators who was investigating the case, and they were the ones that had helped to clear him.

Q. What else?

A. That was the statement that Mr. Fenton made.

Q. Helped to clear him. Was it said, "Milda, that might help you?"

A. No, sir, I didn't hear that.

Q. You didn't hear that?

A. No, sir.

Q. You wouldn't say it wasn't said?

A. If it was it wasn't in my presence.

Q. Not in your presence?

A. No, sir.

Q. You were only out of the room once?

A. That is true.

Mr. Erickson: I think that is all.

Mr. Fenton: That is all, Mr. Wells. Thank you.

Mr. Erickson: Just one more question.

Q. When was it she asked for legal counsel?

A. When Mr. Nelson asked her where she got the strychnine.

Q. Do you know what time that was, about?" Two o'clock, three, or when?

A. No, that was later in the evening, possibly 8:00, 8:15.

Q. About 8:15?

A. Maybe later. I wouldn't exactly set the time.

Q. Maybe earlier?
A. It was possibly later.
[fol. 182] Q. Well, maybe earlier?
A. I wouldn't try to set the time. The only way that I could set the time was when I came out of the courtroom.
Q. And it would be merely a guess, wouldn't it?
A. That is right.

Mr. Erickson: That is all.

By the Court:

Q. What time was it you came out of the courtroom?
A. 9:30, judge.

The Court: Anything further?
Mr. Fenton: That is all.
Mr. Erickson: That is all.

(3:27 p. m. Jurors admonished by the court, recess for fifteen minutes.)

After Recess 3:45 P. M.

The Court: The record may show the jurors, the alternate, juror, defendant and her counsel and counsel for the State are present. You may proceed.

Mr. Fenton: Your Honor, the only thing at this time would be if the defendant wished to cross examine Mr. Nelson further, there was a request that he be kept available for further cross examination.

The Court: Do you wish to recall the sheriff?
Mr. Erickson: Yes.

[fol. 183] ARTHUR NESLON resumed the witness stand and further testified as follows:

Cross-examination.

By Mr. Erickson (continued):

Q. Sheriff: on the 9th day of July, that was after Milda arrived at the courthouse, was there any conversation among you, or yourself and Mr. Wells and Mr. Fenton regarding a lie detector?
A. I don't remember a lie detector being mentioned.

Q. Would you say it was not mentioned?
A. It was not mentioned in my presence.
Q. That one could be used against Milda?
A. No, I never heard it mentioned.
Q. That was not mentioned?
A. That didn't——
Q. In your presence?
A. Not to my knowledge it wasn't.
Q. All right.

Mr. Erickson: That is all.
Mr. Erickson: I would just like to call Mr. Fenton—not Mr. Fenton, Mr. Wells.
The Court: Anything further?
Mr. Erickson: I think that is all I have with him.
The Court: Anything further? Any redirect?
Mr. Fenton: No, your Honor.

[fol. 184] CHARLES WELLS resumed the witness stand and further testified as follows:

Cross-examination.

By Mr. Erickson (continued):

Q. Now, Mr. Wells, on the 9th at the courthouse, was a lie detector mentioned? I forgot to ask you that.
A. Not in my presence, no.
Q. Not in your presence?
A. No, sir.
Q. The use of one?
A. No, sir.
Q. Was anything said that one could be used on her?
A. No, sir.
Q. You didn't hear that conversation?
A. No, sir.

Mr. Erickson: That is all.
Mr. Fenton: That is all, Mr. Wells, thank you.
Mr. Fenton: Plaintiff rests, your Honor.
Mr. Erickson: May I have just one or two minutes?
The Court: You may have five or ten minutes.

Mr. Erickson: I believe I should take ten.

The Court: You may. The court will remain in session.

(Counsel for defendant, defendant and defendant's father leave the courtroom.)

(3:55 P. M. Defendant and her counsel return into court.)

Mr. Erickson: The defense rests.

The Court: The State rests?

Mr. Fenton: Yes, your Honor.

[fol. 185] The Court: We will excuse the jury until tomorrow morning.

(Jurors admonished by the court. Jurors retire from the courtroom.)

Mr. Erickson: I would like to make a motion, your Honor.

The Court: You may proceed.

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Erickson: Comes now the defendant, Mildred Ashdown, through her attorney J. Vernon Erickson, and moves the court to direct a verdict for the defendant that the State of Utah has failed to prove beyond a reasonable doubt or according to the statute of the State of Utah, the case of murder in the first degree.

First, there has been no motive, as required by the statute, and according to law.

Second, that the crime that is included in murder in the first degree, murder in the second degree, has not been proved or is lacking proof according to the statute and the court cannot find either murder in the first degree or second degree.

Third, that they have failed to prove beyond a reasonable doubt the crime of manslaughter, involuntary or voluntary, if the court should include that.

Fourth, that the court allowed the purported confessions of the defendant thereby denying her sacred right to have counsel.

Fifth, that it was under duress; she was held five to six hours as the evidence shows. The record also by implication and evidence shows that she requested counsel

which the state of Utah refused. The time she was held [fol. 186] there under questioning, and the testimony of the sheriff and the officers show conclusively in my opinion that there was duress, those confessions which I think the court has stricken out, the written confession, but allowed the oral.

I will prepare a motion to that effect so that it can be substituted.

There might be some other elements I want to add to it, I think, your Honor, regarding the conversations in the office of the judge there. I want to look up the law on that, the indications and statements that were made by Mr. Fenton at chambers. I think it is vitally important.

The Court: Do you wish to add some other grounds?

Mr. Erickson: No, your Honor, I think that was prejudicial error, the statements of the court while all of us were in there, as to those statements and the indication the court showed, and what was said in the office.

The Court: You may prepare your further grounds and submit to the court during the evening if possible.

Mr. Erickson: I will, your Honor, I will do that, I wanted to check the law on that, which I think I am right.

The Court: If you ask to include further grounds in your motion you may have until nine o'clock tomorrow morning to submit your other grounds in writing, providing you serve copies on counsel by nine o'clock tomorrow morning.

[fol. 187] Mr. Erickson: Now, your Honor, I notice in the file we have that confession. I wouldn't want the jury to take the file.

The Court: The jury will not be permitted to take the file.

Mr. Erickson: They will not see that written confession.

The Court: They will not be permitted to take the file or the exhibit. Exhibits 1 and 2 the court believes should go to the jury.

Mr. Erickson: The State Chemist's analysis.

The Court: The chemist's analysis.

Mr. Erickson: Yes.

The Court: They were received without objection, as I recall. I believe those are the only exhibits which have been received. Exhibit 3 was offered in connection with the preliminary matter before the jury.

Mr. Erickson: That is correct.

The Court: Exhibit No. 3 will not be permitted to go to the jury. The court requests representatives of the press to carefully refrain from any reference to that Exhibit 3.

Mr. Fenton: Your Honor, in relation to the motion to dismiss, I call the court's attention to the fact it is submitted untimely, after the defendant has rested. Beyond that I have no objection to it.

(Discussion as to dismissing witnesses)

The Court: May it be considered on the motion made, that if you are submitting supplemental grounds they may be submitted without argument?

[fol. 188] Mr. Erickson: Yes.

The Court: Is that agreeable to the State?

Mr. Fenton: Yes, your Honor.

(4:40 p. m. Jurors admonished by the court.)

(Recess of court until August 25, 1955, at ten o'clock a.m.)

[fol. 189] Thursday, August 25, 1955—10 A. M.

(Jurors all present, defendant in court with her counsel)

The Court: The motion pending before the court will be overruled and denied.

Mr. Erickson: I do not need an exception to that, your Honor.

The Court: The statute saves your exception. Anything further before the court reads the instructions?

Mr. Fenton: Nothing further.

(Thereupon the court instructed the jury in writing.)

(Thereupon counsel for the respective parties argued the case to the jury.)

(11:38 a. m. Jurors retire to deliberate on a verdict.)

Mr. Fenton: The State has no exceptions.

Mr. Erickson: Comes now the attorney for the defendant and objects to the instruction No. 6, for the following reason:

That the court has erroneously submitted to the jury a constitutional question that should be decided by the court

and not submitted to the jury, that being a question of law that the court should pass upon, the coercion and rights of accused should be a matter of law and not a matter of fact.

That is the only exception I have.

(11:44 a. m. Recess of court awaiting return of the jurors.)

[fol. 190] Friday, August 26, 1955—6:25 A. M.

(Jurors return into court. Defendant present with her counsel.)

The Court: Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foremen: Yes.

The Court: Hand the verdict to the clerk. The clerk will read the verdict.

VERDICT

The Clerk: (Reading) "We the jurors in the above case find the defendant guilty of a felony, to wit, murder in the first degree, as charged in the information, and we recommend life imprisonment and not the death penalty."

The Court: Poll the jury.

(To the question by the clerk "Was and is this your verdict?" each of the jurors answered in the affirmative.)

The Court: The clerk will file the verdict.

In view of the verdict it becomes necessary for the court to fix a time for sentence.

Mr. Erickson: After we excuse the jury.

(Discussion between defendant and her counsel.)

Mr. Erickson: Today.

The Court: Does the defendant waive further time?

Mr. Erickson: We are ready, your Honor.

The Court: May the record show that the defendant [fol. 191] waives further time and consents to the imposition of sentence at this time?

Mr. Erickson: That is right.

The Court: I am wondering if you would desire to make any motion in arrest of judgment.

Mr. Erickson: No, I am not going to make a motion in arrest of judgment. I will immediately get out my motion for a new trial. I think I can include everything in it.

SENTENCE

The Court: The jury in this case has found you, Milda Hopkins Ashdown, guilty of murder in the first degree, and has recommended life imprisonment and not the death penalty. The law provides that for murder in the first degree a person shall suffer the death penalty or upon recommendation of the jury may be imprisoned in the state prison of Utah at hard labor for life. It is the judgment of this court that you, Milda Hopkins Ashdown, are guilty of murder in the first degree, as found by the jury.

Pursuant to the recommendation of the jury the sentence of the court is that you shall be sentenced to imprisonment in the state prison of the State of Utah for life.

A commitment will be issued accordingly.

Mr. Erickson: Now, your Honor, may I have the commitment held for at least five days until I can prepare my motions and writ of probable cause?

The Court: Yes, the commitment will be stayed until Tuesday, September 6, 1955.

(Recess.)

[fol. 192] REPORTER'S CERTIFICATE (omitted in printing)

[fol. 193] IN THE DISTRICT COURT FOR IRON COUNTY, STATE OF UTAH

[Title omitted]

INSTRUCTIONS TO THE JURY—Filed August 26, 1955

Ladies and Gentlemen of the Jury:

1

The following instructions are given to you relative to the law governing this case. It is the duty of the jury to give heed to and carefully follow these instructions and you

should refer to and consider them carefully in connection with any questions pertaining to the law which may arise in your deliberations in the jury room.

2

In this case an information has been filed charging the defendant with the commission of the crime of murder in the first degree, it being alleged that on the 5th day of July, 1955, within Iron County, Utah, the defendant murdered Ray Ashdown. When arraigned upon this information, the defendant pleaded "not guilty." This plea constitutes a denial of all the allegations of the information and puts upon the State the burden of proving the truth of such allegations by evidence which convinces the jury beyond a reasonable doubt. The filing of the information constitutes no proof of guilt and the defendant is to be presumed innocent unless and until you are convinced from the evidence beyond a reasonable doubt that she is guilty.

3

The jurors are the exclusive judges of the facts in the case and of the credibility of the witnesses. Nothing stated by the court in these instructions nor anything said or done by the court during the course of the trial should be construed by you as any indication whatsoever of any opinion of the court as to the guilt or innocence of the defendant. That question is exclusively for the jury.

4

You are instructed that you should not find the defend-[fol. 194] ant guilty unless you are convinced from the evidence beyond a reasonable doubt that each and all of the following propositions are true, to wit:

(a) That Ray Ashdown died on or about the 5th day of July, 1955.

(b) That his death was caused by poisoning resulting from the drinking of a beverage or liquid containing strychnine.

(c) That the defendant wilfully and feloniously induced or caused Ray Ashdown to drink such beverage or liquid containing strychnine.

(d) That the defendant then and there knew that said beverage contained strychnine in quantity sufficient to endanger human life.

(e) That the defendant then and there wilfully and feloniously intended to cause the death of Ray Ashdown and did thereby cause his death.

(f) That such acts on the part of the defendant occurred within Iron County, Utah, on or about July 5, 1955.

5

You are instructed that if you find from the evidence beyond a reasonable doubt that each and all of the foregoing propositions a, b, c, d, e, and f are true then you should render a verdict that the defendant is guilty of murder in the first degree as charged in the information. On the other hand, if you are not convinced from the evidence beyond a reasonable doubt that each and all of said propositions a, b, c, d, e, and f are true then your verdict should be "not guilty."

6

In this case there has been testimony that on two occasions the defendant was questioned or interviewed in the presence of the sheriff and other officers and that she made certain statements in answer to questions. Referring to such alleged statements, you are instructed to consider carefully all the surrounding circumstances including the events of the day and the experiences of the defendant during the day and days immediately preceding. You should consider the attitude and conduct of the officers mentioned, their statements to the defendant, and whether any threats were made or any promises, either express or implied, of immunity from prosecution, or whether any assurance was given of any benefit or reward to the defendant if she made a statement. You should also consider the length of time covered by the questioning and whether the circumstances show any coercion or compulsion or any physical or mental strain or suffering or fear or hysteria on the part of the defendant during the time. After giv- [fol. 195] ing due consideration to all the surrounding circumstances, you should determine whether the alleged statements were made by the defendant, and if so, whether such statements or any of them are entitled to be believed

and if so to what extent. You are the exclusive judges of the credibility of such statements and the weight to be given to them if you believe that any such statements were made.

7

You are further instructed that when circumstantial evidence is relied upon, in whole or in part, to obtain conviction of a person charged with crime, it is not only necessary that the circumstances all concur showing that the defendant committed the crime, but that all such circumstances are inconsistent with any other rational conclusion. The State must not only convince you beyond a reasonable doubt that the alleged facts and circumstances are true, but they must be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused.

8

"Circumstantial evidence" as used herein means proof of facts or circumstances which reasonably and in a natural order of things prove other facts or circumstances. In criminal prosecutions it frequently happens that there is no eye witness of the act charged to have been committed, but there may be proof of facts and circumstances from which a reasonable inference of the commission of such act may arise. That inference may be weak or strong, dependent upon the nature of the facts and circumstances which are proved. They may be such as may give rise to a mere suspicion of guilt, or they may be such as to convince a jury beyond a reasonable doubt of the guilt of the defendant. It is the duty of the jury, in a case where circumstantial evidence is relied upon, in whole or in part, to carefully weigh and consider the circumstances proved and determine whether they all concur to prove guilt or whether they can be explained upon some other reasonable hypothesis. If after a careful weighing of all the evidence in the case the jury is convinced beyond a reasonable doubt of the defendant, the verdict should be guilty. But if there remains a reasonable doubt, then the verdict should be not guilty.

9

You are instructed that the term "feloniously" as used herein means with a wilful intent to harm or injure another.

[fol. 196]

10

You are instructed that intent or intention may be inferred or presumed from a person's acts and conduct, considered in connection with the surrounding situation and circumstances. The law presumes that a sane person intends the natural and probable consequences of his acts. In order to determine intent you should consider the circumstances and situation shown by the evidence, the character of the acts done, the manner in which they were done, and what would be the natural and probable consequences of such acts.

11

You are further instructed that when testimony is given of a statement or declaration of a man who is now deceased, you should remember that there is no opportunity to cross-examine such deceased person as to the statement and you should give due consideration to the disadvantage suffered by the party against whom such testimony is directed. Also, you should give due consideration to the probability or improbability of the statement being correctly remembered and accurately related by the witness testifying to such a statement.

12

You are further instructed that a person accused of crime is presumed to be innocent until proved guilty by evidence which convinces the jury beyond a reasonable doubt of his guilt. A defendant is not required to take the stand and testify and in case he does not testify, such failure must not be considered as any proof of guilt or as any evidence whatever against him.

13

You are instructed that the penalty for first degree murder is death, or upon recommendation of the jury it may be imprisonment for life, in the discretion of the court. If you find from the evidence that the defendant is guilty of

murder in the first degree, you should then consider and determine whether there should be made a recommendation for life imprisonment, and it should be shown upon your verdict, if you decide to make such recommendation.

14

You are instructed, and the court requests you to remember, that statements made by counsel on either side are not to be considered as evidence in the case.

[fol. 197]

15

A reasonable doubt is a fair doubt, growing out of the evidence or lack of evidence in the case. It is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and common sense. It is such a doubt as leaves your mind, after a careful examination of all the evidence in the case, in that condition that you cannot say that you have an abiding conviction to a moral certainty of the guilt of the defendant. A doubt to justify an acquittal should be reasonable, and should exist after a candid, honest and impartial consideration of all the evidence admitted in the case.

16

You are the sole judges of the facts proved, of the credibility of the witnesses, of the weight and effect of the evidence, and of the inferences to be drawn therefrom, and in determining these matters you are to exercise your best judgment, based upon your experience in life. You may take into consideration the conduct and manner of the witnesses while testifying before you; their intelligence and means of observation; their opportunities to know and their capacity to remember and to state the facts to which they testify; their interest or lack of interest, if any has been shown, in the result of the trial; their prejudice or bias, if any has been shown, and the probability or improbability of the truth of their statements in view of all the other evidence. You are not bound to believe all that any witness may have testified to, nor are you bound to believe any witness. You may believe one witness as against many, or many witnesses as against one. If you believe any witness has wilfully testified falsely as to any

material fact in the case you are at liberty to disregard the whole or any part of the testimony of such witness, except as such witness may have been corroborated by a credible witness or credible evidence in the case. In case there is a conflict in the testimony of the witnesses it is your duty to reconcile such conflict so far as you can, but it is still for you to determine for yourselves where the ultimate truth of the matter lies.

17

It is your duty to consider the evidence all together, fairly, impartially, conscientiously and without prejudice of any kind. You should arrive at your verdict solely upon the evidence introduced before you upon the trial. You should not consider nor be influenced by an evidence offered which was not admitted by the court, nor are you [fol. 198] to consider any evidence given, if the same was afterwards by the court ordered stricken out. You should not be influenced by, nor should you consider, any rumors or expressions of opinion you may have heard or read out of court, nor by the fact, if you believe it to be a fact, that a public sentiment exists in favor of or against the defendant.

18

You are instructed to keep in mind the responsibility that is yours as jurors in this case. Your duty is to determine from the evidence received in open court whether or not the defendant committed the crime charged in the information. You should not be influenced by any prejudice against the defendant or sympathy for the defendant, nor by any desire to bring punishment or to avoid bringing punishment to a fellow creature. You are judges of the facts in this case. You should determine what the facts are respecting the defendant's guilt or innocence calmly, dispassionately, honestly, fairly to both the people of the State and the defendant. You should realize and remember that if jurors in criminal cases are persuaded by appeals to either passion, prejudice or sympathy to go against their judgment as to what were the facts, they are not performing their sworn duty as jurors. Therefore the court admonishes you to decide, without being influenced by either prejudice or sympathy, what were the facts in this case. If,

from the whole evidence you are convinced beyond a reasonable doubt that the defendant is guilty of the crime charged in the information, it is your duty, regardless of appeals to sympathy, to render a verdict of guilty according to the facts found. On the other hand, if after careful consideration of the whole evidence, you have a reasonable doubt as to defendant's guilt, you should render a verdict of not guilty.

19

After you have considered the evidence fully, fairly and impartially and have consulted together as to what your verdict should be, if you cannot agree upon a verdict, you should so report to the court. Each juror should decide according to his own conviction. This does not mean, however, that a juror should not consider carefully the views and opinions of his fellow jurors. You should discuss the evidence carefully and calmly together. No juror, from mere pride of opinion hastily formed or expressed should refuse to agree, nor on the other hand should he surrender any conscientious view founded on the evidence. It is the duty of each juror to reason with his fellow jurors con- [fol. 199] cerning the facts with an honest desire to arrive at the truth and with a view of arriving at a verdict. If you can agree upon a verdict without a violation of individual conscientious conviction you should do so. To that end you should deliberate together with calmness and due consideration for the views and opinions of fellow jurors.

20

These instructions are to be considered and construed together as a whole; each instruction should be read and understood with reference to and as a part of the entire charge, and not as though any instruction was intended to present the whole law of the case on any particular point.

21

When you retire to deliberate you will select one of your members as foreman. Your verdict must be in writing, signed by your foreman, and when found must be returned by you into this court. Your verdict must be unanimous.

You will be given three forms of verdict as follows:

1. Guilty of murder in the first degree.

2. Guilty of murder in the first degree and we recommend life imprisonment and not the death penalty.

3. Not guilty.

You should use one of these forms of verdict in rendering your verdict.

Dated this 25th day of August 1955.

Will L. Hoyt, *Judge.*

[File endorsement omitted.]

[fol 200] In the District Court of Iron County

[Title Omitted]

Verdict—Aug. 25, 1955

We, the Jurors in the above case, find THE Defendant guilty of a felony, to wit Murder in the first degree, as charged in the information, and we recommend life imprisonment and not the death penalty.

Date August 25, 1955.

Howard M. Adams, Foreman.

[Filed Endorsement Omitted.]

[fol. 201] In the Fifth Judicial District Court of the State of Utah in and for the County of Iron

[Title Omitted]

Motion for New Trial—Filed Aug. 31, 1955

Criminal #245

The defendant, Milda Hopkins Ashdown, moves that the verdict of the jury in the above entitled cause be set aside and that the Court grant her a new trial for the following reasons:

1. The verdict is contrary to law and the evidence.

2. The Court erred in admitting testimony and evidence obtained in violation of the guarantees of the Constitution of the United States and of the State of Utah.

3. The Court erred in submitting to the Jury the question of coercion of the defendant, thereby submitting to the jury a question of law rather than of fact, and in connection therewith erred in charging the Jury as per his Instruction #6, and in failing to define "coercion" in such Instruction.

[Filed Endorsement Omitted.]

J. Vernon Erickson, Attorney for Defendant, Address: 201 Richfield Commercial & Savings Bank Bldg., Richfield, Ut.

[fol. 202] In the Fifth Judicial District Court of the State of Utah in and for the County of Iron

[Title Omitted]

Ammended Motion for New Trial—Filed Sept. 2, 1955

Criminal #245

The defendant, Milda Hopkins Ashdown, by this her Amended Motion, Moves that the verdict of the jury in the above entitled cause be set aside and that the Court grant her a new trial for the following reasons:

1. The verdict is contrary to law and the evidence.

2. The Court erred in admitting testimony and evidence introduced by the State to the effect that defendant under oral questioning prior to her arrest, orally confessed to the crime charged, for the reason that such testimony and evidence were obtained through coercion, duress and promises of immunity and in violation of law and of the guarantees of the Constitution of the United States and the State of Utah.

3. The Court erred in charging the Jury as per his Instruction #6, in that said Instruction misdirected and improperly instructed the Jury, in this: That it was not alone a question for the Jury to find whether they believed the statements had or had not been made by defendant during the oral questioning prior to her arrest, but rather whether they believed such statements had been made by the defendant and that such statements were the free and

voluntary statements of defendant and not made under coercion, duress and promises of immunity, or that defendant had not been deprived of her constitutional rights during such examination, and the Court in failing to so instruct committed error in submitting same to the Jury.

4. Errors in law occurring at the trial and excepted to by the defendant.

[Filed Endorsement Omitted.]

J. Vernon Erickson, Attorney for Defendant. Address: 201 Richfield Commercial & Savings Bank Bldg., Richfield, Utah.

[fol. 203] IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR IRON COUNTY

[Title omitted]

MINUTE ORDER DENYING MOTION FOR NEW TRIAL—September 13, 1955

The defendant having been charged with the crime of First Degree Murder and having been tried upon said charge before a jury and said jury having rendered its verdict of guilty of said offense, with the recommendation of life imprisonment, and the sentence having been imposed in accordance with the verdict and recommendation of the jury, and defendant having filed a motion for a new trial, the defendant came before the Court with her Counsel J. Vernon Erickson, Esq. for hearing of said motion. The State was represented by Patrick H. Fenton, District Attorney and A. M. Marsden, County Attorney. The Court heard the argument of counsel and overruled and denied said motion. Counsel for the defendant requested a stay of execution of sentence for ten days to give opportunity for taking appeal. The Court ordered execution of sentence stayed until 10 a.m. of Saturday 24, 1955, and remanded the defendant to the custody of the sheriff until said time.

[fol. 204] IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH IN AND FOR THE COUNTY OF IRON

[Title omitted]

NOTICE OF APPEAL—Filed October 13, 1955

Name and Address of Appellant: Milda Hopkins Ashdown, Cedar City, Ut.

Name and Address of Appellant's Attorney: J. Vernon Erickson, Richfield, Utah.

Crime: Felony, murder in the first degree.

Statement of Judgment—Sentence: Aug. 25, 1955, Jury returned verdict of "Guilty" and recommended life imprisonment. Aug. 25, 1955, Defendant sentenced to life imprisonment in the State Penitentiary.

Bail: Not admitted to bail—Defendant confined in Canon City, Colorado.

Sept. 13, 1955, Motion for New Trial denied.

The above named appellant, hereby appeals to the Supreme Court of the State of Utah from the above stated verdict and judgments.

Dated October 13, 1955.

J. Vernon Erickson, Attorney for Appellant. Address: 201 Richfield Commercial & Savings Bank Bldg., Richfield, Utah.

[File endorsement omitted.]

[fol. 205] DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Omitted in Printing)

[fol. 206] IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH IN AND FOR THE COUNTY OF IRON

[Title omitted]

DESIGNATION OF POINTS ON APPEAL—Filed October 13, 1955

The Defendant-Appellant hereby designates the following points on appeal:

1. The verdict is contrary to law and the evidence.
2. The Court erred in finding that there was no coercion, duress or promises of immunity or violation of constitutional rights of defendant.
3. The Court erred in admitting testimony and evidence introduced by the State to the effect that defendant under oral questioning prior to her arrest, orally confessed to the crime charged, for the reason that such testimony and evidence were obtained through coercion, duress and promises of immunity and in violation of law and of the guarantees of the Constitution of the United States and the State of Utah.
4. The Court erred in charging the Jury as per his Instruction #6, by which the Jury was confused and misdirected so as to render an improper verdict against defendant.
5. The Court erred in denying Defendant's Motion for Acquittal.
6. The Court erred in denying Defendant's Motion for New Trial.

[File endorsement omitted.]

J. Vernon Erickson, Attorney for Appellant. Address: 201 Richfield Commercial & Savings Bank Bldg., Richfield, Utah.

[fol. 207] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 8456

STATE OF UTAH, Plaintiff and Respondent

v.

MILDA HOPKINS ASHDOWN, Defendant and Appellant

OPINION

McDONOUGH, Chief Justice:

Milda Hopkins Ashdown was found guilty of murder in the first degree in the death of her husband, Ray Ashdown, by a jury which recommended life imprisonment. She appeals from the judgment entered in accordance with that verdict.

On July 5, 1955, Dr. R. G. Williams of Cedar City, Utah, received an emergency call from Mrs. Ashdown to attend her husband. When the doctor arrived, Mr. Ashdown was in a convulsive state and told the doctor that he had taken some bitter-tasting lemon juice about a half-hour before. He died immediately after the doctor's arrival and the doctor later conducted an autopsy, sending certain specimens to the state chemist for analysis. According to the chemist's report, the stomach contents when analyzed showed the presence of strychnine.

After the funeral of Ray Ashdown on July 9, Mrs. Ashdown was taken from the cemetery where her husband was buried to the City and County Building for questioning by the sheriff, his deputies, and the district attorney. Although she was accompanied to the building by her sister, she was questioned alone for a period of five and one-half hours. At that time, no complaint had been filed against her. Her father and an uncle appeared during the time of the questioning and requested that she be given an attorney or that they be allowed to enter the room where she was questioned. They were denied admittance and assured by a deputy that there was an attorney with her who would apprise her of her constitutional rights. After about four or more hours of questioning, Mrs. Ashdown confessed that she had put strychnine in lemon juice and had given it to

her husband to drink. She then made a request for the first time for an attorney and was told by the men present that it was unnecessary at that point because the only thing she hadn't told them was where she had obtained the poison. Thereafter, she related where she had obtained it and on the following day, she signed a written confession.

The trial court ruled that any evidence secured after she had asked for counsel was inadmissible and the written confession was not introduced for consideration by the jury.

She here contends that the oral confession was obtained from her by means of coercion, duress, and promises of immunity and should not have been admitted. She charges that her limited education and hysterical condition and the length of time she was held without counsel or the advice of her family caused her to give evidence against herself which she would not have otherwise given. Further, she was influenced by the statements of the district attorney to the effect that he had been cleared of charges of murder in Europe through the efforts of investigating officials.

The trial court found that the defendant was advised of her constitutional rights before she made the statements of confession; that she did not ask for an attorney until after making those statements; that there were no threats nor promises of immunity, except that the district attorney informed her that if poison had been given by mistake it might make a difference between a prosecution for murder and manslaughter, and informed the defendant of the penalties for the two offenses; and that the method of examination and circumstances were not severe enough to amount to compulsion as that is contemplated by the constitutional provisions which provide that a person shall not be compelled to give evidence against himself. After ruling that the oral confession was admissible, the trial court submitted the issue of coercion, as affecting credibility, to the jury. [fol. 208] Although the burden of proof as to the voluntariness of the confession lies with the party seeking to use it as evidence, i.e., the prosecution, after the trial court has decided from the evidence that the confession was voluntarily made, the appellate court will not disurb that finding in the absence of a showing of abuse of its discretion where there is substantial evidence from which it could reasonably so find. State v. Crank, 105 Utah 332, 142 P.2d 178; III

Wigmore on Evidence, Third Ed., Sec. 862. Some of the points upon which appellant relies as demonstrating coercion are refuted by the facts and uncontradicted evidence: (1) She complains that she did not have benefit of counsel at the time she made her confession. Ordinarily, a confession is not rendered inadmissible merely because it was made by the accused without counsel, Mares v. Hill, 118 Utah 484, 222 P.2d 811; State v. Braasch, et al., 119 Utah 450, 229 P.2d 289; and she made no request for counsel until after she had made the confession here admitted for the jury's consideration. She did request an attorney immediately after confession and the trial court carefully excluded all statements, including her written confession, made after that time. (2) She contends that she was not properly informed of her privilege against self-incrimination. Although she took the stand for the limited purpose of testifying as to circumstances surrounding her confession, she offered no evidence to dispute the testimony of the sheriff and his deputies that she was so informed within one-half hour of the beginning of the questioning, some four hours before she made any incriminating admissions. (3) She maintains that prolonged questioning without food or rest may have had the effect of limiting her ability to give a voluntary confession. The evidence shows that she was questioned from 4:00 p.m. until about 9:30 p.m. and that she gave her confession within the last hour. Her condition was not uncomfortable to the point of coercion during the questioning, although the weather was hot; the questioning was carried on by men whom she knew and who permitted her to discuss at will her family affairs much of the time. Under these circumstances, we do not feel that questioning for a period of five and one-half hours would tend to break her will or induce her to confess to a crime which she did not commit.

(4) Appellant is a person of limited education and was naturally emotionally upset at the time of the questioning. She had come to the court room immediately from the funeral and interment of her husband; there is some evidence that she was "crying," "moaning," and "sobbing" intermittently during the questioning. Certainly the intelligence, character, and situation of the accused at the time of the confession is an important consideration. Mani-

festly, the will of a person who is of tender age or of weak intellect may be more easily overcome than that of one who is more mature or more intelligent. This, alone, however, will not render a confession inadmissible and if the confession was obtained in a manner and by such methods as are consistent with the proper detection of crime and determination of guilt, then our duty is to sustain the trial court. State v. Mares, 113 Utah 225, 192 P.2d 861. Therefore, this aspect of her confession should be considered in relation to the point which we consider the most difficult; that is, whether the statements of the district attorney were such as to imply a promise of immunity from prosecution or otherwise coerce the accused into confessing.

(5) The deputy sheriff, who was present at the questioning testified:

"A. Mr. Fenton [the district attorney] made the statement as I recall being in quite a predicament at one time *his* self; that he was accused of killing four men and through the cooperation of the investigating officers and by telling the truth the investigating officers was of much value to him and possibly had saved him from the firing squad.

"Q. Where, with relation to this conversation you have told us about did this particular conversation come in?

"A. This was after, as I recall it, this was after she had been advised that her husband's death was caused by strychnine poisoning, and the statute of first degree murder and manslaughter was read to her. I think that statement that you made, Mr. Fenton, then was following. • • •

[fol. 209] "Q. Mr. Wells, in relation to the 9th day of July or any other time, do you know of any promises or offers that were made to Mrs. Ashdown that if she would tell what happened she would not be prosecuted?

"A. Not in my presence, no, sir.

Mrs. Ashdown took the stand for the purpose of giving testimony on this point only. She did not testify to any threats or third degree methods used upon her, but stated:

"A. Well, he said 'If you will tell us what happened, why it will go a lot easier on you.' He says 'I confessed and it was a lot easier on me, if I hadn't confessed I might not gotten off, I might have been facing the firing squad now.' "

As a result of the testimony of these two witnesses, the court called the district attorney, Patrick Fenton, as its own witness and questioned him as follows:

"Q. . . . Referring to the testimony of the sheriff and Deputy Wells, regarding conversations with the defendant in the courtroom at the City & County Building in the afternoon or evening of the 9th of July, there was some statement made relative to the defendant being advised that it would be better for her if she told what had happened. Was any statement like that made by you or the sheriff or Deputy Wells, to Milda Ashdown?

"A. No, your Honor.

"Q. Did you tell her 'If you will tell us what happened why it will go a lot easier on you,' in substance or effect?

"A. No, you Honor.

"Q. Did either the sheriff or Deputy Wells make any statement to that effect to Milda Ashdown?

"A. No, your Honor; not in my presence.

"Q. Now what was said regarding some circumstance of your having been involved in some investigation and that you had avoided proceedings by telling what had happened? Was there anything said on that subject by you to Milda Ashdown that day?

"A. Yes, your honor.

"Q. Will you tell us what it was, as accurately as you can.

"A. Yes, your Honor. Mrs. Ashdown had been asked by the sheriff several times if there was any possibility of an accident in connection with this matter, if she might possibly have got hold of some poison and put it in the glass of lemon juice thinking it was salt. And at one point during that phase of the conversation I told Mrs. Ashdown that at one time in Europe I had been accused of killing five men and that I had told the investigating officers of what had happened, and that they had helped and in effect cleared me of the charges, and that if it was an accident she might wish to tell the investigating officer what had happened. That is the conversation as nearly as I can remember it, your Honor."

As to the interpretation of the statement made by the district attorney, there is a decided conflict in the evidence and while we acknowledge the trial court's power to resolve

[fol. 210] that conflict, there remains the question of whether the statement, as related by the prosecution's witnesses, was designed to and did influence the giving of the confession by raising hopes of immunity from persecution or other benefit. There is a wide disparity in the views of courts dealing with the problem of the effect of such vague, implied promises and it is obvious that each of such cases must be considered in the light of all the circumstances. The apparent conflict of authority is probably best summed up in 20 Am. Jur., Evidence, sec. 508:

"The indefinite hope of benefit held out by advice to the accused that it would be better for him if he would confess has sometimes been held sufficient to render resulting confessions involuntary, especially where such advice is given by one in authority. But the sounder rule is that a confession is not rendered involuntary by advice to the accused that it would be better for him to confess if guilty, and if not guilty, to stand firm. Surely no temptation to an innocent man falsely to accuse himself can be found in the latter language. It is of much more importance to inquire as to the authority of the person who made the statement. Assuming that the authority of the persons addressing the accused was equal, there is little practical difference in saying that it would be easier for the accused if he confessed, or that it would be better for him to confess, or that it would be better for him to tell the truth.

"There is some difference of opinion as to whether saying to the accused that it would be better for him to tell the truth or to confess constitutes such an inducement as will make a confession obtained in consequence of it involuntary. In England, the tendency of the courts is to regard advice to tell the truth or to confess or tell all about the crime, when given by a person in authority, as sufficient to render involuntary any resulting confession, and there is some support for this view in the United States when the exhortation to the accused is made by a person in authority, as distinguished from a private person. The prevailing opinion, however, is that telling the accused that it would be better for him to speak or tell the truth does not furnish any inducement, or a sufficient inducement, to render objectionable a confession thereby obtained, unless threats or promises are applied."

In the case of State v. Gee Jon, 46 Nev. 418, 211 P. 676, 30 A.L.R. 1443, various authorities holding with the majority view are reviewed; these cases hold that the exhortations made did not render the confessions inadmissible. It appears to us that some of these statements are more definite in promise and more calculated to produce a confession in response than the advice given in the present case. For instance, in State v. Allison, 24 S.D. 622, 124 N.W. 747, it was held that the statement by the sheriff to the defendant, "'The best thing you can do is to tell the truth, and you might get out of it today,'' did not justify the exclusion of the confession from the jury.

However, we need not rely merely upon majority precedent in concluding that the statement under examination should not be regarded as sufficient inducement to affect the voluntariness of the confession, for the record discloses uncontradicted testimony that (1) the statement was made early in the questioning during a discussion of whether or not Mr. Ashdown might have been given poison by mistake, (2) appellant was warned that any statement which she made might be used against her in court proceedings, and (3) she was also informed that the authorities did not want a confession from an innocent person. In relation to the final point, Sheriff Nelson testified:

"... I says 'No, we don't want you to confess to anything you didn't do; we don't want anyone to confess to something they didn't do.' And I think that was told to her at least twenty-five or thirty times during the conversation in the evening."

Under these circumstances, we agree with the trial court that the confession was voluntary within the meaning of constitutional provisions against self-incrimination and properly admissible in evidence.

Appellant contends that there was error in Instruction No. 6 in that the jury was not instructed that they might [fol. 211] reject in its entirety the confession of the appellant if they determined that it was made involuntarily: Instruction No. 6 reads:

"In this case there has been testimony that on two occasions the defendant was questioned or interviewed in the presence of the sheriff and other officers and that she made certain statements in answer to questions. Referring to

such alleged statements, you are instructed to consider carefully all the surrounding circumstances including the events of the day and days immediately preceding. You should consider the attitude and conduct of the officers mentioned, their statements to the defendant, and whether any threats were made or any promises, either express or implied, of immunity from prosecution, or whether any assurance was given of any benefit or reward to the defendant if she made a statement. You should also consider the length of time covered by the questioning and whether the circumstances show any coercion or compulsion or any physical or mental strain or suffering or fear or hysteria on the part of the defendant during the time. After giving due consideration to all the surrounding circumstances, you should determine whether the alleged statements or any of them are entitled to be believed and if so to what extent. You are the exclusive judges of the credibility of such statements and the weight to be given to them if you believe that any such statements were made."

The instruction was correct in allowing the jury to weigh the circumstances surrounding the giving of the confession and determining not the admissibility of the confession but rather the credibility of the confession as evidence. Appellant cites and emphasizes certain language from Justice Larson's opinion in the case of State v. Crank, 105 Utah 332, 142 P.2d 178, as indicating that the jury may determine anew, after the court has admitted the confession as voluntarily made, whether to accept the confession or reject it from their consideration because it was not made within the standards set by the law for its admissibility. The error of this view is pointed out by the language of the majority opinion in the Crank case, written by Justice Wade:

"We agree with the rule approved in those cases, that a confession is not admissible in evidence unless it was voluntarily made; that this question must be determined by the court from all of the evidence from both sides bearing thereon; that if the court is satisfied from the evidence that the confession was voluntary, then the court admits the confession in evidence to the jury, together with all of the evidence on the question of whether it was voluntary, and the circumstances surrounding its being made, and from such evidence the jury must determine the weight and

credibility to be given it, but may not determine its competency as evidence, that being a question for the court." The court, in that case, recognized that the jury might give the evidence so little weight because of the circumstances under which it was obtained as to practically ignore it, but stated that the jury should be instructed to consider such evidence for the purpose of determining what weight should be given to it. In the case of State v. Braasch, et al., 119 Utah 450, 229 P.2d 289, the court cited as error the giving of an instruction similar to the one here requested by appellant that the jury should disregard entirely the confession if they found it was procured through coercion. Clearly, the instruction given in this case was proper.

Judgment affirmed.

We concur: J. Allan Crockett, Justice; F. Henri Henriod, Justice; Lester A. Wade, Justice; Geo. W. Worthen, Justice.

[fol. 212] In the Supreme Court of the State of Utah

[Title omitted]

Order Denying Petition for Rehearing—October 1, 1956

Upon consideration of the petition for rehearing heretofore filed herein and the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is, denied.

[fol. 213] Clerk's Certificate to foregoing papers omitted in printing.

[fol. 214] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING CERTIORARI AND LEAVE TO PROCEED IN FORMA PAUPERIS—June 3, 1957

On petition for writ of Certiorari to the Supreme Court of the State of Utah.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1051.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 3, 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 158

MILDA HOPKINS ASHDOWN,

Petitioner,

vs.

STATE OF UTAH

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR PETITIONER

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(Appointed by this Court)

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Opinions Below

The opinion of the Supreme Court of the State of Utah following petitioner's appeal from a conviction of murder in the first degree is reported at 5 Utah 2d, 59, 296 P. 2d, 726, and appears at R. 153. Utah Supreme Court's denial of Petition for Rehearing appears at R. 161.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S. C.A. Section 1257 (3). The judgment of the Supreme Court of Utah was entered on April 30, 1956 (R. 153), and a petition for rehearing was denied on October 1, 1956 (R. 161).

The petition for writ of certiorari was filed on December 17, 1956. A brief in opposition was filed by respondent and certiorari was allowed on June 3, 1957 (R. 162).

Constitutional Provisions and Statutes Involved

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides, in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

2. Article 1, Section 7, of the Constitution of the State of Utah, which provides:

> "(Due Process of Law) No person shall be deprived of life, liberty or property, without due process of law."

3. The Self Incrimination and Due Process Clause of the Fifth Amendment to the United States Constitution which provides in pertinent part:

> ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

4. Article 1, Section 12, of the Constitution of the State of Utah, provides in pertinent part:

> ". . . The accused shall not be compelled to give evidence against himself; . . ."

Questions Presented

1. Whether petitioner, a defendant in a state capital case, was denied due process under the Fourteenth Amendment of the United States Constitution:

(a) Where petitioner was taken in for questioning while in an emotional and irrational state, immediately after the funeral services of her deceased husband, and was subjected to a series of constant interrogation by the sheriff and his deputies and the district attorney for a period of approximately 5½ hours, during which time petitioner did not have food or rest, was not properly advised of her constitutional rights, was denied her request for counsel, and her father and uncle were barred from the room in which she was being questioned, although they requested admittance, and their request for legal counsel for her was denied and they were told she had an attorney who would represent her, when in truth and in fact such attorney was the district attorney who was not representing petitioner, but the State of Utah.

(b) Where the admissions made by petitioner during such interrogation were obtained by coercion, and were not voluntary.

2. Whether the admission of petitioner's oral confession constitutes a denial of due process under the Fourteenth Amendment to the United States Constitution, and of the guarantees against self incrimination and due process as guaranteed under the Fifth Amendment to the United States Constitution.

3. Whether petitioner was denied due process because the jury under the court's instruction #6, were asked to pass upon the weight and credibility to be given the testimony concerning such oral admissions, upon their consideration of all of the circumstances relating thereto, when the testimony of four of the witnesses in relation thereto was not given in the presence of the jury.

Statement

Petitioner was first brought to trial on August 22, 1955, on an information charging her with murder in the first degree committed by her at Cedar City, Iron County, Utah, on the 5th day of July, 1955, upon the person of Ray Ashdown (R. 1).

A trial was had on August 22, 1955, before a jury in Iron County, Utah. Counsel for petitioner objected to the admission of testimony relating to the oral admissions and confessions made by petitioner during interrogation prior to trial on the grounds they were obtained in violation of the constitutional rights of the defendant (R. 88), but the trial court ruled adversely and admitted such testimony of the officers as to such admissions (R. 112). No other evidence of defendant's guilt was presented. The case went to the jury on August 25, 1955, and the jury after deliberating some 19 hours returned a verdict of guilty with recommendation of life imprisonment (R. 139). The petitioner was thereafter sentenced to imprisonment in the Utah State Prison for life (R. 140).

Petitioner appealed from her conviction to the Supreme Court of the State of Utah, and the Supreme Court of the State of Utah affirmed the judgment of conviction on April 30, 1956 (R. 153), and denied a petition for rehearing on October 1, 1956 (R. 161).

On December 17, 1956, petitioner filed in this Court her petition for a writ of certiorari and a motion for leave to proceed in forma pauperis. The petition and motion were granted on June 3, 1957 (R. 162).

The petitioner was the wife of Ray Ashdown. They lived at Cedar City, Utah. On the morning of July 5, 1955, Dr. R. G. Williams was called to the Ashdown residence by

Mrs. Ashdown to attend her husband (R. 18). When the Doctor arrived Mr. Ashdown was having a generalized convulsive seizure and death seemed to be imminent. He told the Doctor he had drank some lemon juice about a half hour before, then he took another convulsion and died (R. 19).

Analysis of the contents of the stomach of Mr. Ashdown by the State Chemist revealed that the same contained strychnine and the cause of his death was attributed to strychnine poisoning (R. 36). There was a bottle of lemon juice found in the refrigerator of the Ashdown home but it did not contain any strychnine (R. 35), and nowhere in the home or premises was any strychnine found (R. 52).

On the 9th of July, 1955, a funeral was held for the deceased, and at the cemetery after the burial the sheriff of Iron County, Arthur Nelson, asked Mrs. Ashdown's son-in-law to bring Mrs. Ashdown to the City and County Building for a talk (R. 55). The defendant and her sister came to the Sheriff's Office. There were present Sheriff Nelson and Deputies Arch Benson and Chuck Wells. The ladies complained about the heat and were served a glass of lemonade (R. 56). The Sheriff then asked if they could talk to the defendant alone in the Courtroom (R. 56). They went into the Courtroom where in addition to the Sheriff and his Deputies, the District Attorney, Patrick H. Fenton, was present (R. 56).

Then the defendant was subjected to a series of questioning which began at about 4 in the afternoon and did not end until about 9 or 9:30 in the evening (R. 108-9), during all of which time defendant never left the room, was not given any food or rest, and at about 8:30 in the evening defendant made certain statements to the effect that she put the poison in the cup of lemon juice and gave it to her husband to drink, after which she was held on a charge of murder in the first degree (R. 59).

During the course of such questioning the District Attorney, Patrick H. Fenton, told defendant that while he was in Europe he had killed five men and confessed to the authorities or he might have faced a firing squad (R. 84, 94, 106 & 133).

The record discloses that the petitioner was a person of limited education, having gone to school only to the seventh or eighth grade and that she was married between the age of 16 and 17 years (R. 85); that she had just attended the funeral and burial of her husband when she was taken directly from the cemetery to the Court House for questioning (R. 55); that the weather was extremely hot (R. 56); that she was in a hysterical frame of mind and sobbed and cried during the questioning (R. 80, 87 & 100); that she was taken in for questioning alone and was not represented by family, friends or legal counsel; that her father was in the Court House during the questioning and requested that she be given an attorney, but her father as well as her uncle were denied admission to the room where she was being questioned, and were told that there was an attorney in there to represent her (R. 79); that during the course of such interrogations the District Attorney told the defendant that he had been accused of killing five men while he was in the Army in Europe and confessed to the authorities or he might have faced a firing squad, and that it would be better for her to confess (R. 84, 94 & 106). The District Attorney also read to the petitioner from the Utah Statutes, defining the crimes of manslaughter, murder, etc., and the prescribed penalties (R. 97-8-9, 101, 103-4, & 106-7).

The petitioner, after the alleged admission, requested legal counsel which request was entirely ignored (R. 59, 65-6). Next day a written confession was prepared by the Sheriff and handed to her for signing which she did (R. 64-5). At the trial of the action counsel for defendant objected to the admission of the written testimony and of the

testimony relating to the oral admissions for the reasons they were obtained in violation of the constitutional rights of the defendant (R. 88). The court ruled the written confession should not be admitted but made findings to the effect that there was no coercion, duress or promises of immunity or violation of the constitutional rights of defendant (R. 110-11-12).

The trial court instructed the jury under instruction #6 as follows:

> "In this case there has been testimony that on two occasions the defendant was questioned or interviewed in the presence of the sheriff and other officers and that she made certain statements in answer to questions. Referring to such alleged statements, you are instructed to consider carefully *all the circumstances* including the events of the day and the experiences of the defendant during the day and days immediately preceding. You should consider the attitude and conduct of the officers mentioned, their statements to the defendant, and whether any threats were made or any promises, either express or implied, of immunity from prosecution, or whether any assurance was given of any benefit or reward to the defendant if she made a statement. You should also consider the length of time covered by the questioning and whether the circumstances show any coercion or compulsion or any physical or mental strain or suffering or fear of hysteria on the part of the defendant during the time. After giving due consideration to all the surrounding circumstances, you should determine whether the alleged statements were made by the defendant, and if so, whether such statements or any of them are entitled to be believed and if so to what extent. You are the exclusive judges of the credibility of such statements and the weight to be given to them if you believe that any such statements were made" (R. 142). (Italics supplied.)

The witnesses, Patrick H. Fenton, John Walter Segler, Milda Hopkins Ashdown and William Henry Hopkins, testified before the Court in the absence of the jury (R. 77-108).

Summary of Argument

I.

Petitioner was taken in for questioning while in an emotional and irrational state, immediately after the funeral services of her deceased husband, and was subjected to a series of constant interrogation by the officers of Iron County, Utah, for a period of approximately 5½ hours, during which time petitioner did not have food or rest, was not properly advised of her constitutional rights, was denied her request for counsel, and her father and uncle were barred from the room in which she was being questioned although they requested admittance, and their request for legal counsel for her was denied and they were told she had an attorney who would represent her, when in truth and in fact such attorney was the District Attorney who was not representing petitioner, but the State of Utah. During the course of such interrogations the District Attorney told the petitioner that he had been accused of killing five men while he was in the Army and confessed to the authorities or he might have faced a firing squad, and that it would be better for her to confess.

The instant case presents the question whether petitioner was denied due process under the Fourteenth Amendment of the United States Constitution by the method and manner in which she was held and interrogated.

Petitioner made admissions after she had been interrogated for approximately 5½ hours, and the instant case presents the question of whether such admissions were

coerced and were not voluntary, due to the method and circumstances surrounding the interrogations.

II.

The admissions made by petitioner during such interrogation were admitted in evidence at her trial over the objection of her counsel. Such admissions constituted the vital and sole part of the State's case against her and resulted in her conviction. And the instant case presents the question of whether petitioner was denied due process under the Fourteenth and Fifth Amendments to the Constitution, by the admission of statements extracted from her under the circumstances demonstrating they were coerced and not voluntary.

III.

At petitioner's trial the court, in the absence of the jury, heard all of the evidence surrounding the method and manner in which petitioner was interrogated, prior to her admissions. All of this evidence was not presented to the jury, but the court in its instruction #6, instructed the jury they were to pass upon the weight and credibility of such statements after giving due consideration to all the surrounding circumstances, the attitude and conduct of the officers mentioned, their statements to the defendant, etc., which they could not do when the testimony of four of the witnesses in relation thereto was excluded from the jury.

This presents a further question that petitioner was denied due process.

ARGUMENT

I.

Petitioner was Denied Due Process of Law

(a) By the Method and Circumstances of the Examination by which the Admissions were Obtained.

In the instant case the state court by its decision held that no constitutional rights of petitioner had been violated, and that the oral confessions and admissions made by her under questioning prior to arrest and trial were voluntary within the meaning of constitutional provisions against self incrimination and properly admissible in evidence (R. 159).

Petitioner contends that the facts herein do not justify such a decision and are in direct conflict with the rulings of this Court, and that the method and circumstances surrounding the examination of petitioner prior to her arrest show that she was denied those fundamental rights guaranteed by the Due Process Clause of the Fourteenth Amendment and the Self Incrimination and Due Process Clause of the Fifth Amendment.

This case is not about guilt. This case concerns itself with constitutional guarantees in a capital crime. Procedural due process of law, not the guilt of this petitioner, is relevant to the issue before this Court. In *Sacher* v. *United States*, 343 U.S. 1, at 23, 25, 28, Mr. Justice Frankfurter gives us warning, that:

> "Bitter experience has sharpened our realization that a major test of a true democracy is the fair administration of justice.... '... (and) in the development of our liberty, insistence upon procedural regularity has been a large factor.' ... It is not for nothing that most

of the provisions of our Bill of Rights are concerned with matters of procedure.

* * * * *

". . . Time out of mind this Court has reversed conviction for the most heinous offenses, even though no doubt about the guilt of the defendant was entertained. It reversed because the mode by which guilt was established disregarded those standards of procedure which are so precious and so important for our society."

No impartial reader of the trial record could agree that the petitioner fully understood her rights during the period she was held for questioning. She was in a tired and emotional state of mind having just come from the funeral and burial of her husband. It was an extremely hot day. She was a person of limited education. No member of her family was permitted to be in the room with her during such examination, although her father and uncle requested it. Her father and uncle were denied entrance to the room where she was being questioned and when they requested that she be given an attorney, they were misled by being told she had an attorney in there to represent her.

Furthermore there is a question as to whether petitioner was ever properly advised of her constitutional rights. The interrogators didn't bother to have a reporter or stenographer present during this questioning or make a tape recording and so there is no official record of just when or how the accused was advised of such rights, or whether she was in any condition to understand just what her rights were.[1]

---

[1] Sheriff Nelson testified on direct examination that she was so advised *a few minutes* after the questioning began (R. 57) but on cross examination he said that at least *25 minutes or one-half hour* elapsed before petitioner was so advised (R. 69). A good many questions and a good many answers were undoubtedly made in this

In the case of *Powell* v. *Alabama*, 287 U.S. 45, 77 L.Ed. 158, the right of counsel and the total attributes of a fair trial were defined by Mr. Justice Sutherland as follows:

---

period of time. It is stated that petitioner talked mostly during this time about family affairs, but the record shows that she was being questioned. (Italics supplied.)

Sheriff Nelson testified:

"Well, as I remember *when I started talking to her* I asked her if she had give it any more thought about where the poison might have come from that was pronounced that Ray had had or got. She said no, she didn't know anything any more about it than she did before. I don't know whether she used them very words or not, but she intimated, she said she didn't know any more about it. (Italics supplied.)

• • • • •

". . . Well, I said to Mrs. Ashdown again, that the doctor still claimed that Ray had been poisoned and we would like to find out what had happened and asked her if there was any chance that she had made a mistake of any kind and put poison in that lemon juice and thought it was salt. And she said she didn't think so. I asked her if she knew of any poison that was around the premises of any kind.

"Q. Sheriff, prior to asking Mrs. Ashdown if she had made a mistake, was Mrs. Ashdown informed as to whether or not she needed to answer your questions?

"A. *I don't believe at that time.* I believe it was *a little later on when we* advised her of her—when *you* advised her of her constitutional rights. I don't believe it was right on the start". (R. 56-7). (Italics supplied.)

But Sheriff Wells was very indefinite at what time the defendant was advised of such rights as per the following excerpt from his testimony on cross examination at R. 132:

"Q. Yes. And you kept Milda in there, the three of you, questioning her, reading the statutes to her and defining manslaughter and murder, and she wasn't even charged with murder, isn't that the truth?

A. There had been no charges made at that time.

Q. You didn't know what the charges would be, did you?

A. No, sir; I did not.

Q. Certainly. And now you come back and say he advised her of her constitutional rights, and today he was reading the statutes. Now, which was it?

A. *That was later on—*

Q. Oh.

(Continued on next page.)

"... Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense even though he have a perfect one. He requires the guiding hand of counsel *at every step in the proceedings against him.*"
U.S. at p. 69. (Italics supplied.)

This case further establishes that the right to counsel in state capital cases means that the assistance of counsel must be effective and not a mere sham and that petitioner was entitled to effective counsel at the trial. But in the case at bar the question is how could petitioner ever have effective counsel at the trial, no matter how skilled, in view of what went on before trial. She was denied effective counsel at the trial itself because of what went on before trial while

---

A. He advised her of her constitutional rights.
Q. That was later on.
A. I think—
Q. Do you know what time that was?
A. No.
Q. How many hours?
A. I don't recollect the time, no, sir.
Q. How many hours?
A. I wouldn't say.
Q. Two?
A. I wouldn't say that.
Q. Be three?
A. I wouldn't say that.
Q. Couldn't you guess at that, like you could the two minutes?
A. No. There was too much conversation, *and too many questions.*" (Italics supplied.)

she was held and questioned without counsel, without an understanding of her legal rights, without family or friends and absolutely under the control of the prosecution. You might say she was in fact tried and convicted during such questioning because it sealed her fate at the trial.[2]

The father and uncle of petitioner felt that petitioner needed aid of counsel and wanted to be admitted to the Courtroom where she was being questioned and to get an attorney for her, but they were denied admittance and were misled by being told there was an attorney in there to represent her (R. 79).

Such a procedure is the very essence of unfairness, the taking advantage of a weary, emotional and hysterical woman of a limited education, and is the very situation our founding fathers wished to guard against when they passed those laws which insure fundamental human rights of life and liberty, and insure a fair trial to all accuseds.

Excerpts from the record are set forth to substantiate the above circumstances and to show that the alleged statements of confession made by her were the product of sustained questioning and pressure and that her constitutional rights against self incrimination and due process were flagrantly violated:

---

[2] Associate Justice Rutledge pointed out in the case of *Wood* v. *United States*, 128 F.2d, 265 at 271, decided in 1942, that the right to counsel includes aid in the preparation of the case, and the aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary inquisition which would squeeze out conviction or prejudice by means unconstitutional if used at the trial. He wrote at 128 F.2d, page 277: "(18) The fairer practice, and, we think, the only one consistent with the court's position, would advise the accused in all cases, before permitting him to speak even as a volunteer, of his right to counsel and would warn him that he need not speak and, if he does, it is at his peril."

(a) *That Petitioner was a person of limited education:*

William Henry Hopkins on direct examination:

* * * * *

"Q. How much of an education did she have?

A. Very little education. . . . She probably passed the seventh or eighth grade. . . . She was between sixteen and seventeen years of age when she was married. Just a child like" (R. 85).

(b) *That Petitioner was taken in for questioning directly after the funeral and burial of her husband.*

Sheriff Arthur Nelson on direct examination:

* * * * *

"A. I asked to have her come up. I went out to the cemetery and the funeral was just over and they were ready to leave and I contacted her brother-in-law. . . . Stewart had Mrs. Ashdown in his car, he was a son-in-law of Mrs. Ashdown, and I asked him if he would ask Stewart to bring Mrs. Ashdown by the County and City Building, we would like to talk to her. So Alf brought word back to me that he would go that way and take Mrs. Ashdown to the City and County Building" (R. 55).

(c) *The weather was extremely hot.*

Sheriff Arthur Nelson on direct examination:

"A. Well they were complaining about it being hot and it was hot so we served them a glass of lemonade, and then I asked Mrs. Ashdown if we could talk to her alone in the courtroom. And so we went into the courtroom and talked with her" (R. 56).

(d) *No member of her family was permitted to be in the room with her during such examination, although her father and uncle requested it:*

Sheriff Arthur Nelson on direct examination:

"Q. Was Mr. Arch Benson, another deputy sheriff present during this conversation?

A. No, he was out in the hallway sort of taking care of the door; there was people trying to come in and out and we tried to keep everyone out of the court-room" (R. 56).

Charles Wells on examination by the court:

• • • • •

"Q Did he say he would like to talk to her alone?

A. Yes, sir.

Q. Her sister was with her at that time?

A. Her sister was in the Sheriff's Office at the time, yes, sir" (R. 102).

Walter Segler on direct examination:

• • • • •

"A. Well, when they entered the door at the foot of the stairs this Mr. Benson was at the foot of the steps and didn't figure on anybody entering there" (R. 78).

Mr. Segler, continuing: on direct examination:

• • • • •

"Q. Who was with you?

A. Well, Mr. Hopkins, her father. . . . And I says I am her uncle and this is her father. And I says I don't think she has got a right to be questioned without her father's presence or some attorney.

Q. What happened?

A. And I said I would like to go to the sheriff's office. He never resisted, but we walked up the stairs and when we got to the top of the stairs there was another, either marshal or, I wouldn't be sure, but I believe it was Hoyt, I am not sure, a city marshal, I think. Of course I am not familiar with these names, I just since this came up got acquainted with them" (R. 78-9).

Mr. Segler continuing on direct examination:

"A. I told them I thought that Mr. Hopkins, her father, or some attorney should be in her presence. And they refused to let either one of us go in" (R. 79).

William Hopkins on direct examination:

* * * * *

"A. I remember, if my memory serves me rightly, I appeared there between four and five o'clock and went immediately into the sheriff's office; and there we contacted Mr. Benson, Sheriff Miller and Sheriff Bybee, and as I remember it right, I made the remark that it didn't look to me *like a fair, square deal, to railroad that girl into the sheriff's office without counsel or friends of any description.*

Q. What was the answer to that?

A. Well, if I remember right, I believe Mr. Benson related that she was under suspicion. And if I remember right I believe I told him that we was very sorry, that we had no—that was the first information I had to that effect that she was even under suspicion, and he informed me that she was under suspicion" (R. 85). (Italics supplied.)

(e) *Petitioner did not have benefit of counsel during such examination although she requested it and her father and uncle requested it.*

Sheriff Nelson on direct examination:

* * * * *

". . . At that point she said 'I had ought to have an attorney.' 'Well,' I said 'you have told us about everything now except the strychnine.' I says, 'Tell us where you got the strychnine and we can clear it up and get this over with'" (R. 59).

Sheriff Nelson on examination by the Court:

* * * * *

"A. She said 'I had ought to have an attorney.' That is the way she put it.

The Court: And then what was said?

A. Well, I told her, I said 'Well, you told us about everything now except where you got the strychnine.' I says *'It is a little late to get an attorney.'*

The Court: What did she say then?

A. She didn't ask any more for an attorney. She never mentioned it any more" (R. 65). (Italics supplied.)

Sheriff Nelson on cross examination:

* * * * *

"Q. Now, you stated to the court that after she asked for counsel she had confessed everything but where she got the strychnine, is that correct?

A. Yes, that is right.

Q. And you felt, like you told the court, there was no need for doing that, just as well get it over with.

A. Yes, that is the way I felt about it.

Q. You didn't heed to her request, then did you?

A. No, we didn't" (R. 66).

Sheriff Nelson further on cross examination:

* * * * *

"Q. Now, how many times, sheriff, did that girl ask for counsel, one, two or three times?

A. I heard her ask the one time.

Q. Why didn't you give it to her, sheriff?

A. Well, she had told us about everything then" (R. 73).

John Walter Segler on direct examination:

"A. Well, I says, it isn't fair to take that girl up there and question her without her father's presence or an attorney.

* * * * *

A. And I says, I am her uncle and this is her father. And I says, '*I don't think she has got a right to be questioned without her father's presence or some attorney*'" (R. 78-9). (Italics supplied.)

John Walter Segler further on direct examination:

* * * * *

"A. And then I told them up there again that I was her uncle, and I didn't think they had a right to take her in and question her, and one of the officers, I don't know which one it was spoke up and says, '*Why she's got an attorney in there to defend her.*' He says 'to give her constitutional rights.' I says, 'Is he her attorney, or who?' I says, 'I didn't know anything about it until this time'" (R. 79). (Italics supplied.)

John Walter Segler on cross examination:

* * * * *

"A. Well, I am not sure, but it seems to me like it was Mr. Benson, it was one of them, like I said I wasn't

acquainted with the men, didn't know them at the time, *but they said she has got an attorney in there to advise her, and so they didn't want to let us in, because I said that I figured she needed her father's presence or an attorney. And they said 'Why she's got an attorney in there to advise her.'* And that is the only answer we got, in regard to that" (R. 81). (Italics supplied.)

William Henry Hopkins on direct examination:

• • • • •

"A. . . . and there we contacted Mr. Benson, Sheriff Miller and Sheriff Bybee, and as I remember it right, I made the remark that it didn't look to me like a fair, square deal, to railroad that girl into that sheriff's office without counsel or friends of any description. . . .

Q. Did you ask for counsel then?

A. Yes. I said 'I believe that she should have an attorney in there.' And I made the remark that I intended to employ you as an attorney" (R. 85).

William Henry Hopkins on redirect examination:

• • • • •

"A. Yes, I told them when I first went in there I thought that that was wrong for them to take her in there and quiz her and railroad her" (R. 86).

Sheriff Wells on cross examination:

• • • • •

"Q. Now, you said she did ask for counsel. Was there anyone that spoke up and said you can get him, we will go get him for you now? . . .

A. I think in answering that—

Q. Just answer that.

A. She did ask for counsel.

Q. And she didn't get counsel.

A. Not at that time, no, sir.

Q. Did she ever tell you, 'I don't want counsel?'

A. No, that statement was never made to me" (R. 100-1).

(f) *Petitioner was in an hysterical and emotional condition during the questioning.*

After petitioner made the alleged oral admissions in the evening of July 9th, she was placed under arrest but she wasn't asked to sign any written statement until the next day on the 10th. To show that petitioner was hysterical and not in a calm or unexcited state and didn't understand what she was doing on July 9th when the questioning took place, the following is quoted from the record:

Sheriff Nelson on examination by the Court:

• • • • •

"The Court: Sheriff, why did you wait until the afternoon of the 10th before offering this to Mrs. Ashdown, to sign?

A. Well, we didn't take any written statement on the 9th. We thought we would talk to her on the 10th, *she would be calm and wouldn't be excited and she would know what she was doing.* We didn't want to feel like taking advantage of her" (R. 65). (Italics supplied.)

John Walter Segler on direct examination:

• • • • •

"A. And at that time I heard her crying and carrying on in there.

Q. How long did you hear her crying?

A. A couple of times when I was in the hall, and I don't know how long.

Q. And you were there in the hall how long would you say, how many hours?

A. Well, in the Sheriff's office and thereabout and back and forth to Mrs. Ashdown's place, I would say we was there approximately two and a half hours, or such a matter" (R. 80).

William Henry Hopkins on redirect examination:

"Q. Could you hear Mildred crying?

A. I could. Crying and moaning.

Q. All the time you were there?

A. Well, at intervals, most of the time, yes" (R. 87).

Sheriff Wells on cross examination:

* * * * *

"Q. Was she crying?

A. She would sob and cry at times, yes sir" (R. 100).

(g) *Petitioner was questioned and kept in the Court Room from 4 P.M. until 9:30 P.M. without food or rest:*

Sheriff Nelson on direct examination:

* * * * *

"Q. Will you tell us the time of day that conversation took place?

A. As near as I can remember it was about four o'clock" (R. 54).

Sheriff Wells on examination by the Court:

* * * * *

"The Court: Did she leave the room at any time during the period from when she first went into the court-room until she left in the evening?

A. No sir.

The Court: Was she offered the opportunity to leave the room at any time?

A. I don't think that I remember of a request being made or the offer being made at any time, Judge.

The Court: What time was it that she actually did leave the courtroom?

A. That was possibly, I would say, between 9:30 and a quarter to ten.

The Court: Did you notice the time? When you say possibly that doesn't help us.

A. I came out of the courtroom at 9:30, yes, sir. I noticed the time" (R. 96).

Sheriff Wells on cross examination:

* * * * *

"Q. Did you offer anything, any food, didn't you say 'Will you have lunch? Will you eat?' Did you say that?

A. You mean after four o'clock?

Q. Yes.

A. No" (R. 100).

Sheriff Nelson on direct examination:

* * * * *

"Q. Was anything said to Mrs. Ashdown that she was free to leave the courtroom if she cared to?

A. By George, I don't remember about that" (R. 57).

John Walter Segler on direct examination:

* * * * *

"A. . . . But before that, when Mr. Wells come out he says, 'Well' he says, 'it has been six and a half hours in this'" (R. 81).

(h) *Petitioner's oral confession was not voluntary and the following excerpts from the record show that it wasn't and that inducements were made:*

Sheriff Nelson on direct examination:

* * * * *

"A. Well, I said to Mrs. Ashdown again, that the doctor still claimed that Ray had been poisoned and we would like to find out what had happened and asked her if there was any chance she had made a mistake of any kind and put poison in that lemon juice and thought it was salt. . . ." (R. 56).

Sheriff Nelson on direct examination:

* * * * *

"A. Well, then I asked Mrs. Ashdown again, I says, 'No,' I says, 'Think and see if there has been a chance that there has been a mistake made, any kind of a mistake made' I says 'we should know about it *and we could iron it out*' " (R. 58). (Italics supplied.)

Sheriff Nelson on direct examination:

". . . And I think I asked her about the same thing over again, that *somebody* must have put some poison in the cup because Ray was pronounced being poisoned. . . ." (R. 59). (Italics supplied.)

Sheriff Nelson on direct examination:

". . . Why don't you tell us the truth about that poison and how it got in the cup. I says '*Tell us the truth about it so as we can clear this thing up.*' She started crying and said 'I will never see my children any more.' And I says, '*Yes, you would see your children again, Mrs. Ashdown.*' I says, '*Your children will be taken care of.*'

I says, '*Just tell us who put the poison in the cup.*' . . ." (R. 59). (Italics supplied.)

Sheriff Nelson on cross examination:

. . . . . .

"Q. Then I asked you at the hearing, to impress it very much, at that time I will ask you did not Patrick Fenton, the district attorney, in your presence and in the presence of Mr. Welsh, say 'I killed five men while I was in the Army and it is better to confess, I got off. If I hadn't done that' and you studied and you studied, and you said you didn't hear that statement. . . . You know now it was said.

A. Yes, I know there was something to that effect, now, yes" (R. 70).

Milda Hopkins Ashdown, on direct examination:

"Q. Milda, will you tell the court when you were being examined by the officers what Pat Fenton told you in reference to killing those men?

A. Well, he said '*if you will tell us what happened why it will go a lot easier on you.' He said, 'I confessed and it was a lot easier on me, if I hadn't confessed I might not have gotten off, I might have been facing the firing squad now'*" (R. 84). (Italics supplied.)

Sheriff Wells on direct examination:

. . . . . .

"A. Sheriff Nelson asked her if there couldn't have been some mistake of when this liquid was taken by her husband. He asked her if she couldn't have made a mistake by putting something in the liquid besides salt. Her answer was no.

Q. Was that subject dwelled on at any great length, Mr. Wells?

A. Yes, sir. *That question was asked her, to the best of my recollection fifteen or twenty times*" (R. 91). (Italics supplied.)

Sheriff Wells on further direct examination:

• • • • •

"A. Mr. Nelson at that time asked Mrs. Ashdown, and I think the statement was made this way: He says, '*Mrs. Ashdown, you know that Ray did not mix the poisoning and take it his self*' " (R. 93). (Italics supplied.)

Sheriff Wells on further direct examination:

• • • • •

"A. Mr. Fenton made the statement as I recall being in quite a predicament at one time his self; that he was accused of killing four men and through the cooperation of the investigating officers and by telling the truth the investigating officers was of much value to him and possibly had saved him from the firing squad" (R. 94).

Sheriff Wells on examination by the Court:

"The Court: Can you tell me how it came about that Mr. Fenton read those statutes relating to murder or manslaughter and what was said before he came to reading those statutes?

A. At that time, your Honor, I think that she was asked if a mistake could have been made, at the time that this lemon juice was mixed, and if there had been a mistake made, I think Mr. Fenton, as I understood it, described the different penalties, in case that there would have been a prosecution.

Q. And what did she say?

A. As I remember it he read the statutes to her and told her the difference, that if a prosecution, a complaint was issued against her, of what the difference of the complaint would be.

Q. Was there anything said about it would be better for her to tell what happened at that time?

A. I think she was told at that time that if there had been a mistake made, that in case of prosecution it would be a lesser degree, the crime" (R. 101).

Patrick H. Fenton, on examination by the Court:

* * * * *

"A. Yes, your Honor. Mrs. Ashdown had been asked by the sheriff several times if there was any possibility of an accident in connection with this matter, if she might possibly have got hold of some poison and put it in the lemon juice thinking it was salt. And at one point during the phase of the conversation I told Mrs. Ashdown that at one time in Europe I had been accused of killing five men and that I had told the investigating officers of what had happened, and that they had helped and in effect cleared me of the charges, and that if it was an accident she might wish to tell the investigating officers what had happened. That is the conversation as nearly as I can remember it, your Honor" (R. 106).

Sheriff Wells on cross examination:

* * * * *

"A. Mr. Fenton at that time told Mrs. Ashdown that he had an experience and was charged at that time with killing four men, I think, in Europe, and he had cooperated with the investigators who was investigating the case and they were the ones that had helped to clear him" (R. 133).

Sheriff Nelson on direct examination:

. . . . . .

"A. I told Mrs. Ashdown, I says, 'Is there any chance, possible chance, that there has been a mistake made, accidently or any other way?' And I says, 'If there has, I wish we knew about it. . . .' 'Well,' I says, 'Someone must know something about it. . . .'" (R. 117).

Sheriff Nelson further on direct examination:

. . . . . .

". . . And I says, *someone* had to—*someone* had to put the poison in that lemon juice, it is pronounced poison. . . ." (R. 118). (Italics supplied.)

Sheriff Nelson further on direct examination:

". . . Finally I said to Mrs. Ashdown, I said, 'Mrs. Ashdown, I don't believe that Ray put that poison in that juice.' I said, 'Why don't you tell us the truth about that poison and who put it in?' She says 'I'll never see my children any more.' *'Yes,' I says 'You'll see your children again, that will be taken care of'*" (R. 118-9). (Italics supplied.)

Sheriff Wells on cross examination:

. . . . . .

"A. Mr. Nelson at that time asked Mrs. Ashdown, he told Mrs. Ashdown that he didn't believe that that was the truth, that he didn't think that Ray had mixed the strychnine in the lemon juice; therefore, he asked Mrs. Ashdown to tell him the truth about who put the strychnine in the lemon juice. . . ." (R. 127).

(i) *Petitioner was asked the same questions over and over:*

Sheriff Nelson on direct examination:

". . . And I think I asked her about the same thing over again that somebody must have put some poison in the cup because Ray was pronounced being poisoned. . . ." (R. 59).

Sheriff Wells on direct examination:

* * * * *

"A. Sheriff Nelson asked her if there couldn't have been some mistake of when this liquid was taken by her husband. He asked her if she couldn't have made a mistake by putting something in the liquid besides salt. Her answer was no.

Q. Was that subject dwelled on at any great length, Mr. Wells?

A. Yes, sir. That question was asked her, to the best of my recollection *fifteen or twenty times*" (R. 91). (Italics supplied.)

(j) *At the beginning of the questioning before petitioner had been charged with any crime or advised of her constitutional rights, the District Attorney read the statutes relating to manslaughter and murder to petitioner as though petitioner was guilty of one or the other charge:*

Patrick H. Fenton, District Attorney, on examination by the Court:

* * * * *

"Q. Now, in relation to this matter of reading the statutes as testified to by Deputy Wells, will you state what was said preliminary to the reading of those statutes?

A. Yes, your Honor. It was in line with the same phase of questioning concerning possibility of an accident; and I either got the statute or asked one of the officers to get it, I am not sure which, it was brought in at my request or else I went and got it, and it was explained to Mrs. Ashdown—

Q. Just a moment—

A. All right. Or told Mrs. Ashdown—

Q. Say who said what.

A. Yes. I told Mrs. Ashdown that as I saw the matter there was a possibility of either first degree murder or involuntary manslaughter, if she had done it, and that the penalty for involuntary manslaughter was up to one year in the county jail; and that the penalty for first degree murder was, with a recommendation of leniency from the jury, either death or life imprisonment and without that recommendation a mandatory death penalty and then I read the statutes covering those particular subjects. The only conversation was first degree murder and involuntary manslaughter; there was nothing said about second degree murder or voluntary manslaughter" (R. 106-7).

Sheriff Wells on examination by the Court:

* * * * *

"A. As I remember it he read the statutes to her and told her the difference, that if a prosecution, a complaint was issued against her, of what the difference of the complaints would be" (R. 101).

Sheriff Wells on cross examination:

* * * * *

"Q. Yes. And you kept Milda in there, the three of you, questioning her, reading the statutes to her and

defining manslaughter and murder, and she wasn't even charged with murder, isn't that the truth?

A. There had been no charges made at that time.

Q. You didn't know what the charges would be, did you?

A. No, sir; I did not" (R. 132).

Patrick H. Fenton, District Attorney on cross examination:

"Q. I will ask you, Mr. Fenton, this, you told her that manslaughter was one year in the county jail?

A. Involuntary manslaughter.

Q. Involuntary manslaughter. Did you explain the two degrees of manslaughter?

A. I explained that there were two degrees, *but that in my opinion this was either involuntary manslaughter or first degree murder* as she was charged with it.

Q. Did you tell her that she was charged—

A. No.

Q. —going to be charged with that?

A. No.

Q. You were not telling her what her charge would be, you were just relating your own case—

A. No.

Q. Is that right?

A. No, not correct.

Q. Well, I just wanted what you told her.

A. The statement was made in connection with consideration of this specific matter.

Q. Yes.

A. *And at that time the lady had not been charged.*

Q. Or you didn't tell her what she was going to be charged with?

A. That is correct, *no one knew what she was going to be charged with*" (R. 107-8). (Italics supplied.)

This then is the record speaking and establishing the method and mode of petitioner's examination.

The state court in its opinion says, ". . . The questioning was carried on by men whom she knew and who permitted her to discuss at will her family affairs much of the time. Under these circumstances we do not feel that questioned for a period of 5½ hours would tend to break her will or induce her to confess to a crime which she did not commit" (R. 155).

Although the questioning was by people she knew, still all of those people were in authority. And these people in authority had kept telling her it would be better for her to tell the truth. The district attorney had told how he had confessed to killing five men in Europe or might have faced a firing squad and that it would be better for her to confess, and the sheriff had promised her that if she would tell the truth she would see her children again and they would be taken care of. It would be impossible to measure the force of the influence thereby exerted against the petitioner in her worn, weary and emotional condition and to what extent they entered into her decision to confess.

On the question of when a confession is voluntary, there is much authority.[3]

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[3] The United States Supreme Court passed on the matter in *Bram* v. *United States*, 168 U.S. 532, 533, 18 S.Ct. 183, 192, 42 L.Ed. 568, where the court reviewed both English and American decisions on the subject. It is there said:

". . . While all the decided cases necessarily rest upon the state of facts which the cases considered, nevertheless the decisions as a whole afford a safe guide by which to ascertain whether in this case the confession was voluntary, since the facts here presented are strikingly like those considered in many of the English cases."

Going on, the Court reviews American authorities:

"In the following cases the language in each mentioned was held to be an inducement sufficient to exclude a confession or

Statements elicited from the accused after prolonged detention and pressure, can be looked upon with grave sus-

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statement made in consequence thereof. In *Kelly* v. *State* (1882), 72 Ala. 244, saying to the prisoner: 'You have got your foot in it, and somebody else was with you. Now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth'. In *People* v. *Barrie*, 49 Cal. 342, saying to the accused: 'It will be better for you to make a full disclosure.' In *People* v. *Thompson* (1890), 84 Cal. 598, 605, 24 P. 384, 386, saying to the accused: 'I don't think the truth will hurt anybody. It will be better for you to come out and tell all you know about it, if you feel that way.' In *Beery* v. *United States* (1893), 2 Colo. 186, 188, 203, advising the prisoner to make full restitution and saying: 'if you do so, it will go easy with you. It will be better for you to confess. The door of mercy is open, and that of justice closed;' and threatening to arrest the accused and expose his family if he did not confess. In *State* v. *Bostick* (1845), 4 Har., Del., 563, saying to one suspected of crime: 'The suspicion is general against you, and you had as well tell all about it. The prosecution will be no greater. I don't expect to do anything with you; I am going to send you home to your mother.' In *Green* v. *State* (1891), 88 Ga. 516, 15 S.E. 10 (30 Am. St. Rep. 167) saying to the accused: 'Edmund, if you know anything, it may be best for you to tell it;' or, 'Edmund, if you know anything, go and tell it, and it may be best for you.' In *Rector* v. *Commonwealth* (1882), 80 Ky. 468, saying to the prisoner in a case of larcency: 'It will go better with you to tell where the money is. All I want is my money, and if you will tell me where it is, I will not prosecute you hard.' In *Biscoe* v. *State* (1887), 67 Md. 6, 8 A. 571, saying to the accused: 'It will be better for you to tell the truth, and have no more trouble about it.' In *Com.* v. *Nott* (1883), 135 Mass. 269, saying to the accused: 'You had better own up. I was in the place when you took it. We have got you down fine. This is not the first you have taken. We have got other things against you nearly as good as this.' In *Com.* v. *Myers* (1894), 160 Mass. 530, 36 N.E. 481, saying to the accused: 'You had better tell the truth.' In *People* v. *Wolcott* (1883), 51 Mich. 612, 17 N.W. 78, saying to the accused: 'It will be better for you to confess.' In *Territory* v. *Underwood* (1888), 8 Mont. 131, 19 P. 398, saying to the prisoner that it would be better to tell the prosecuting witness all about it, and that the officer thought

picion.' If the petitioner had wished to confess, she would have done so at the beginning, but her prolonged refusal to do so, even in the presence of people she knew casts a grave doubt that such statements were willingly made by her. The presence of all of these officers and the district attorney repeatedly asking her questions in her confused state of mind; the reading of the statutes of the different crimes by the district attorney and his statement to her that he had

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the prosecuting witness would withdraw the prosecution, or make it as light as possible. In *State* v. *York* (1858), 37 N.H. 175, saying to one under arrest immediately before a confession: 'If you are guilty, you had better own it.' In *People* v. *Phillips* (1870), 42 N.Y. 200, saying to the prisoner: 'The best you can do is to own up. It will be better for you.' In *State* v. *Whitfield* (1874), 70 N.C. 356, saying to the accused: 'I believe you are guilty. If you are, you had better say so. If you are not, you had better say that.' In *State* v. *Drake* (1893), 113 N.C. 624, 18 S.E. 166, saying to the prisoner: 'If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you.' In *Vaughan* v. *Com.* (1867), 17 Gratt. Va., 576, saying to the accused: 'You had as well tell all about it'".

[4] In a case of long protracted questioning of a Chinese, in the absence of an interpreter, friends or counsel; *People* v. *Quan Gim Gow*, 23 Cal. App. 507, 138 P. 918, 919, the court said:

"While no physical force was used, and neither threats nor promises made, there can be no doubt at all but *that the repeated questioning of the officers, like the constant dropping of water upon a rock* finally wore through his mental resolution of silence.' Admittedly, his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. When, then, did this unwillingness vanish and a desire to talk succeed it? Not after he had been given any period of time for reflection; for his inquisitors allowed him none. The examination was persisted until a response was forthcoming, and, under the circumstances, it must be said that the responses appear to have been unwillingly made and as a direct result of continued importuning. . . . The fact that the questioning was done by police officers presents an important item for consideration in determining whether the admissions extracted were of a voluntary character. . . ." 138 P. at page 919. (Italics supplied.)

been accused of killing five men and might have faced the firing squad except for his confession to the authorities and that it would be easier on her to confess; the repeated statement of the officers that they did not believe Ray put the poison in the lemon juice and urging petitioner to tell who did, etc., finally brought about the expected response from a weary, grief stricken and overborne woman. *Wigmore*, in discussing the considerations that justify the privilege against self incriminations, points out:

> "The real objection is that *any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself morally suffer thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questionjng breeds a readiness to resort to bullying and to physical force and torture. *If there is a right to an answer, there soon seems to be a right to the expected answer, —that is, to a confession of guilt.* Thus the legitimate use grows into the unjust abuse: ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized." (Italics supplied.)
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> 8 Wigmore on Evidence (3rd Ed.) §2251, p. 309.

And after 5½ hours of such persistent questioning in the instant case, Sheriff Nelson said:

> • • • • •
>
> ". . . I don't believe that Ray put that poison in that cup. Why don't you tell us the truth about that poison and

how it got in the cup. I says, 'Tell us the truth about it so as we can clear this thing up. . . ." (R. 59).

He was pressuring her for an answer—the expected answer. The Sheriff continues:

". . . She started crying and said 'I will never see my children any more.' And I says, 'Yes, you would see your children again, Mrs. Ashdown.' I says, 'who put the poison in the cup.' . . ." (R. 59).

And so after 5½ hours of persistent questioning he got the expected answer. She told the sheriff then that she put it in (R. 59).

The record is most clear that petitioner was never afforded the protection of our constitutional guarantees by the manner in which this questioning was carried on. Petitioner was in no condition to have been questioned let alone being taken into the court room (the fact that this questioning took place in the court room was a further means of exerting pressure as it may have led the petitioner to believe she was in fact being tried) and being subjected to a prolonged ordeal, and the statements so made by her were not free and voluntary but were the result of duress, intimidation, sustained pressure and inducements by the officers of Iron County as detailed and enumerated herein. Her right to a fair trial was entirely disregarded in violation of due process of law and the lower court committed gross error in ruling otherwise. Her confession was a result of what her interrogators wanted her to say, not what she wanted to say, it being plainly shown that the District Attorney had concluded she was guilty before she had spoken, and thus read the statutes and penalties of manslaughter and murder to her as he had concluded that she was guilty of one or the other (R. 107-8).

II.

Petitioner was Denied Due Process of Law

(b) By the Admission into Evidence of the Statements Extracted from her under Circumstances Demonstrating such Statements were Coerced and not Voluntary.

The admission and use of the oral confession obtained under the circumstances as disclosed by the record in this case denied petitioner due process of law.

Prior decisions of this Court have settled that when the pressure to confess, whether physical or mental, exerted against a defendant is so great that it wears away the defendant's resistance, a resulting confession is involuntary and its use deprives the defendant of due process of law.[5]

In *Ashcraft* v. *Tennessee*, 322 U.S. 143, 155, this Court speaking through Mr. Justice Black, says:

> "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an un-

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[5] In *Watts* v. *Indiana*, 338 U.S. 49, 53, 49 S.Ct. 1347, 1350, Mr. Justice Frankfurter said:

> "A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary." 338 U.S. at page 53.

> restrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government." 322 U.S. at p. 155.

Also this Court speaking through Mr. Justice Frankfurter said in *Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, at p. 173 of 342 U.S.:

> ". . . Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. . . ."

When petitioner in the instant case was taken in for questioning she was in no condition to be questioned having come directly from the cemetery after having attended the funeral and burial of her husband and being in an emotional and grief stricken state. She was exhausted and the weather was extremely hot, and without being given any food or rest she was subjected to a prolonged ordeal of questioning in the court room of the court house for 5½ hours, without family, friends or an attorney being present, and those members of her family who wanted to be in her presence and aid her, were barred from so doing.

The circumstances surrounding the confessions which are to be reviewed; *Leyra* v. *Denno*, 347 U.S. 556, 558 (1954), must include the physical, emotional and mental condition of the defendant at the time of the arrest; this is essential

in order to apply the test of *Stein* v. *People of State of New York*, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522, in which the Court said:

> "The limits in any case depend upon a weighting of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." 346 U.S. at page 185, 73 S.Ct. at page 1093.

In a recent case decided by the United States Supreme Court, *Fikes* v. *State of Alabama* (1957), 352 U.S. 191, 77 S.Ct. 281, the Court held:

> "Where uneducated Negro of low mentality if not mentally ill, was removed after arrest to a state prison far from his home, without being taken before magistrate as required by Alabama statute, and kept in isolation except for sessions of questioning lasting several hours at a time and his father and a lawyer were prevented from seeing him, confessions thus obtained were not 'voluntary' and their use was a denial of due process, notwithstanding absence of physical brutality or excessive continuous interrogation."

The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment.[6]

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[6] See, e.g., *Brown* v. *State of Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; *Chambers* v. *State of Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; *Lisenba* v. *People of State of California*, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166; *Ashcraft* v. *State of Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192; *Malinski* v. *People of State of New York*, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029; *Haley* v. *State of Ohio*, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224; *Watts* v. *State of Indiana*, 338 U.S. 49, 69 S.Ct. 1347, 93

III.

Petitioner was Denied Due Process of Law

(c) Because the jury under the court's instruction #6 was asked to pass upon the weight and credibility to be given the testimony concerning such oral admissions, upon their consideration of all of the circumstances relating thereto, when the testimony of four of the witnesses in relation thereto was not given in the presence of the jury.

The state court has ruled that instruction #6 was properly given in allowing the jury to weigh the circumstances surrounding the giving of the confession and determining not the admissibility of the confession but rather the credibility of the confession as evidence (R. 160).

The jury was instructed by the court under instruction #6 to consider carefully all the circumstances including the events of the day and the experiences of the defendant during the day and days immediately preceding and to consider the attitude and conduct of the officers mentioned, their statements to the defendant, and whether any threats were made or any promises, either express or implied, of immunity from prosecution or whether any assurance was given of any benefit or reward to the defendant if she made a statement, the length of time covered by the questioning and whether the circumstances show any coercion or compulsion or any physical or mental strain or suffering or fear of hysteria on the part of the defendant during the

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L.Ed. 1801; *Stroble* v. *State of California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, *Stein* v. *People of State of New York*, 346 U.S. 156, 73 S.Ct. 1077.

The above cases illustrate the settled view of this Court that coerced confessions cannot be admitted as evidence in criminal trials.

time, and after giving due consideration to *all* the surrounding circumstances the jury was asked to determine whether the alleged statements were made by defendant and were entitled to be believed. (See Instruction #6, R. 142.) (Italics supplied.)

The state court cites the language of the majority opinion in the case of *State* v. *Crank*, 105 Utah 332, 142 P. 2d 178, in which it was stated:

> ". . . We agree with the rule approved in those cases, that a confession is not admissible in evidence unless it was voluntarily made; that this question must be determined by the court from all of the evidence from both sides bearing thereon; that if the court is satisfied from the evidence that the confession was voluntary, then the court admits the confession in evidence to the jury, *together with all of the evidence on the question of whether it was voluntary, and from such evidence the jury must determine the weight and credibility to be given it*, but may not determine its competency as evidence, that being a question for the court." 105 Utah at page 373, 142 P. 2d at page 196. (Italics supplied.)

The jury in the instant case then did not have before it all of the evidence on the question of whether the confession was voluntary and the circumstances surrounding its being made, because the testimony of Patrick H. Fenton, the district attorney, John Walter Segler, Milda Hopkins Ashdown and William Henry Hopkins was not submitted to the jury. This testimony was given in the absence of the jury and before the court only. The jury did not hear the testimony of Patrick H. Fenton as to the statement made by him to defendant that he had killed five men in Europe and confessed, they did not hear the testimony of John Walter

Segler, an uncle of the accused, who testified that he protested the "railroading" of that girl, and requested that she be given an attorney and that he was kept out of the room in which she was being questioned and told she had an attorney, or of her father, William Henry Hopkins who testified to the same thing, and the testimony of Milda Hopkins Ashdown herself, who testified that Pat Fenton, the district attorney, had told her he killed five men while in the Service and confessed or might have faced a firing squad and that it would be better for her to confess.

It was the duty of the court to recall all of these witnesses and submit all of this evidence to the jury before instructing them to pass upon and determine the weight and credibility to be given the admissions of petitioner.

Such exclusion of testimony from the jury denied petitioner a fair trial and due process of law.

CONCLUSION

For the reasons stated above, the decision below should be reversed and the cause remanded to the court below with appropriate instructions.

Respectfully submitted,

J. VERNON ERICKSON,
Counsel for Petitioner
by Appointment by this Court.

BRIEF OF RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. 158

MILDA HOPKINS ASHDOWN,
Petitioner,

vs.

STATE OF UTAH,
Respondent.

ON CERTIORARI TO SUPREME COURT
OF THE STATE OF UTAH

E. R. CALLISTER,
Attorney General for Utah,

WALTER L. BUDGE,
Deputy Attorney General for Utah,
Of Counsel.

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BRIEF OF RESPONDENT

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No. 158

MILDA HOPKINS ASHDOWN,
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QUESTIONS PRESENTED

1. Was petitioner's oral confession obtained in violation of petitioner's constitutional guaranties as embodied in the Fourteenth Amendment to the Constitution of the United States of America?

2. Was petitioner's oral confession admitted by the Trial Court in violation of the due process of law

guaranteed by the Fourteenth Amendment to the Constitution of the United States of America?

3. Was Instruction No. 6 as given by the Trial Court a violation of due process of law, *the Court having heard witnesses in the absence of the jury for purposes of determining the voluntariness of the confession*, where four of the witnesses who gave evidence to the Court were not thereafter called to testify before the jury?

STATEMENT OF THE CASE

This is on certiorari by Milda Hopkins Ashdown to a decision of the Supreme Court of Utah affirming a verdict of murder in the first degree returned by a jury of her peers who recommended life imprisonment as punishment and not the death sentence.

Milda Hopkins Ashdown, at Cedar City, Iron County, Utah, on the 5th day of July A. D., 1955, murdered her husband, Ray Ashdown, by administering to him strychnine poison. Ray Ashdown was alive on the morning of July 5, 1955, and was seen in the yard of his home by a witness (R. 4-6). On the morning of the same day, Milda Hopkins Ashdown went to the home of two neighbors using their telephones to summon medical aid for her husband (R. 6-16); she told one neighbor that her husband seemed to be in a lot of pain and was going paralyzed from his waist down. *That her husband had not felt well since his breakfast* (R. 14, 15). A physician responded to the calls for aid and attended the husband, observed his death, later performed an autopsy and obtained specimens for analysis (R. 17-49). The physician

had a conversation with Ray Ashdown and testified thereto as follows:

"Q. Did you have a conversation with either Mrs. Ashdown or Ray at that time?

"A. Yes, I did. I directed most of my conversation to Ray, because he looked like he was going to die within a few minutes.

"Q. Will you state the substance of that conversation as you best recall it?

"A. I went up to the couch, and I said: 'Ray, what have you taken? Have you taken any poison? Have you eaten anything spoiled?' Because he looked like he had ingested some toxin of some kind. He was in a generalized state of convulsion. It was very difficult for him to talk. And I administered a sedative to him hypodermically, in the vein, to relax him for just a minute or two so he could speak. And I said: 'Ray, have you taken anything poison?' And he said 'No.' I said: 'Have you eaten anything spoiled?' He said 'No.' I said: *'Were you well this morning when you got up?' He said: 'Yes.' I said: 'When did you get sick?' And he said: 'A little while ago.'* I said: 'Hav-n't you drunk anything or eaten anything?' He said: 'I had some lemonade about half hour ago.'

"Q. Do you recall, doctor, whether he used the word lemonade or lemon juice?

"A. He used lemon juice. He said: 'I had some lemon juice about a half hour ago.' And I said: 'How did it taste, Ray?' And he started into another convulsion, and he said, 'Doc it tasted bitter.' Then he rolled his eyes back and threw his head back and went into a generalized convulsive seizure and died" * * * (R. 18, 19).

Milda Hopkins Ashdown told the physician that she had given her husband salt water.

"Q. Now, I will ask you, doctor, you talked to Milda when you arrived at the Ashdown home, is that correct? That is the defendant?

"A. Yes.

"Q. I will ask you, doctor, did she tell you that she had given him salt water?

"A. Yes, she told me that she had given him two or three glasses of salt water.

"Q. Salt water.

"A. I remember.

"Q. Assuming a person had strychnine and had taken it, what effect does salt water have?

"A. Makes them die quicker.

"Q. Die quicker.

"A. Yes, it hastens, it hastens the poison.

"Q. Isn't that the remedy they give for strychnine, to give you salt?

"A. I don't know. I know—

"Q. Isn't that a fact? Doesn't your medical book tell you that?

"A. No. No—

"Q. Does it not cause vomiting, salt water?

"A. In some cases a large quantity may.

"Q. Isn't that a fact, doctor?

"A. In some cases it might, a large quantity might promote vomiting.

"Q. It isn't might. It does, doesn't it?

"A. Not always. It depends on the case.

"Q. You know physicians that give it?

"A. Well, I don't know—

"Q. For poisoning?

"A. I don't give it for poisoning" * * * (R. 23).

The specimens obtained from the body of the deceased were transported to the Utah State Chemist by a deputy sheriff

(R. 29-31). The State Chemist made an analysis and found strychnine to be present (R. 31-45).

The county sheriff visited the Ashdown home on the morning of July 5th and examined the premises (R. 50-52). The sheriff testified, in part:

> "Q. Did you observe the dishes in the kitchen, Mr. Nelson?
>
> "A. Yes, we did. They were piled up a pile say this high, on the top there was an aluminum coffee cup on the top with a red ring around the top of it that was setting on the top of the rest of the dishes turned upside down.
>
> "Q. Tell us whether or not the dishes had been washed, Mr. Nelson.
>
> "A. I didn't think they had.
>
> "Q. In relation to this cup you spoke about, had it been washed?
>
> "A. Yes, the cup was clean" * * * (R. 52).

The sheriff, his deputy and the county attorney returned to the Ashdown residence on the afternoon of the 5th of July. They talked with Milda Hopkins Ashdown (R. 52, 53).

> "Q. Will you tell us if you can who spoke and what was said, as nearly as you can remember?
>
> "A. As near as I remmber, I started the conversation. I think I said to Mrs. Ashdown that we would like to talk to her a little about the case, and I asked her if she knew really what happened. She said no she didn't know what had happened. I said to her, 'Well, Mrs. Ashdown, Dr. Williams seems to think that Ray has been poisoned or had some poison.' 'Well,' she says 'I didn't do it. I wouldn't even poison a rat'" * * * (R. 53).

Thereupon the trial judge admonished the jury and recessed the Court (R. 53).

The Court re-convened and thereafter *in the absence of the jury* the Trial Judge heard the continued testimony of the sheriff, testimony of the deputy sheriff, witness for the *defense*, John Walter Segler, the accused's uncle, the *defendant*, Milda Hopkins Ashdown, witness for the *defense*, William Henry Hopkins, the accused's father (R. 53-87). Counsel for the accused made his objection to the admission of oral and written statements of the accused as testified to by the sheriff *in the absence of the jury* (R. 87, 88). The Court took the matter under advisement and recessed until the following day (R. 88). Upon reconvening and *still in the absence of the jury* the Court heard further testimony of the deputy sheriff (R. 89-104). *The Court then upon its own motion called Patrick Linton, the prosecutor, as a witness not in the presence of the jury* (R. 105-109). At the conclusion of the prosecutor's testimony to the Court the following colloquy between Court and counsel is recorded:

> "The Court: Just a moment. Do you request the right to question this witness anything further on that transaction?
>
> "Mr. Erickson: No.
>
> "The Court: By what I said previously I do not mean to rule that you could not question him.
>
> "Mr. Erickson: No, I don't intend to call him and I will not before the jury, but I only want to be certain of this record which the court will pass on.
>
> "The Court: You would perhaps have the right to call him before the jury. If you call him you perhaps ought not to argue that he would be disqualified.
>
> "Mr. Erickson: I wouldn't. The only thing is the preservation of the record in case of a conviction

"The Court: The court doesn't mean to intimate that you are not a liberty to call him as a witness, if you desire to call him.

"Mr. Erickson: Your Honor, I will not call him, just as long as I have this record which your Honor has to pass on" * * * (R. 109).

From the evidence adduced through the witnesses in the absence of the jury, the Trial Court found:

"Regarding the question of whether the prosecution can go into the evidence which has been testified to by the Sheriff Arthur Nelson and by Deputy Wells and Mr. Fenton, the court wishes to make the following statement of its findings:

"First, that there was no promise made or assurance given of any immunity from prosecution.

"Second, the court finds that the defendant was advised before the statements that are sought to be introduced in evidence were made: that she had the right to refuse to answer questions or make a statement and that she had the right to have an attorney.

"Third, that the defendant did not at that time ask for an attorney, nor until after the statements offered were made, except as to certain statements made in answer to questions as to where she procured the strychnine, which questions were asked and answers made after she indicated that she should have or desired to have an attorney.

"Fourth, that the defendant was questioned or interviewed by Sheriff Nelson and Deputy Wells and the District Attorney from approximately 4:00 p. m. until approximately 8:30 p. m. before she made the statements that are under question here; that she was then in the courtroom in the presence of those three officers, two peace officers and the District Attorney, and that her sister, although she came with her to the sheriff's office, wasn't permitted to go into the room.

nor was her father or her uncle permitted to go into the courtroom during the course of that questioning.

"The court finds that there were no threats of violence or other threats made by either of the officers or by the District Attorney.

"Sixth, that there was no promise made nor any assurance given of any benefit or reward, except that the District Attorney informed the defendant that if poison had been given by mistake it might make a difference between a prosecution for murder and manslaughter, and the District Attorney read to the defendant the statute relating to first degree murder and involuntary manslaughter, and informed the defendant of the penalties for those respective offenses.

"The court believes that neither the method of questioning of the defendant under the circumstances shown by the evidence, nor the physical or mental distress suffered by the defendant under the circumstances shown by the evidence were severe enough to amount to compulsion as that is contemplated by the constitutional provisions or statutes which provide that a person shall not be compelled to give evidence against himself.

"The court believes that the circumstances were not such as to induce the defendant to make the statement in question herein, that is such serious statements as the statement that she had furnished or given strychnine to her husband.

"The court believes that the inducing cause of the statement was not fear nor duress, nor compulsion, nor any promise or assurance of any reward or immunity. *The court concludes that the statements made by the defendant to the officers after she stated that she desired or should have counsel are not admissible; that any inquiry as to those statements should not be made in the presence of the jury.* (Emphasis ours.)

> "The court believes that the statements made to the officers prior to that time are admissible, but the court proposes to give to the jury an appropriate instruction as to its consideration of the weight and credibility of such statements. Counsel may proceed accordingly" * * * (R. 110-112).

Thereafter trial resumed with all jurors present and the prosecution called the sheriff and the deputy sheriff to testify. They were examined and cross-examined (R. 113-136). The State rests. The defense rests (R. 136). The defense *did not call upon* the accused, her uncle, her father or the State's prosecutor *to testify before the jury*. These *four* available witnesses had testified to the Court in the absence of the jury.

SUMMARY OF ARGUMENT.

It is the contention of the State of Utah that there was no promise made or assurance given the defendant of any immunity from prosecution; that the defendant was fully and timely advised of her constitutional rights; that the defendant was not threatened with violence or otherwise; that defendant was not promised or assured of any benefit or reward; and, that neither the method of questioning nor the physical or mental distress suffered by the defendant were, under the circumstances shown by the evidence, severe enough to constitute the abridgment of any constitutional guarantee of due process of law.

The State of Utah holds that the oral confession of the defendant was voluntary and not secured by force, duress, fraud or coercion, or in any manner not consistent with due process of law.

The Fifth Amendment to the Constitution of the United States of America forbids the abridgment only by Act of Congress or the United States Government, its agencies and departments, of the rights therein guaranteed and does not apply to acts of the individual states. The Supreme Court of the State of Utah is the proper tribunal to resolve the issues as to the due process guaranties of the Constitution of the State of Utah, and we are here concerned only with the Fourteenth Amendment to the Constitution of the United States of America and the guaranties of due process of law therein declared.

Finally, the State of Utah contends that on the trial of a criminal case in a state court, the introduction in evidence of a free and voluntary confession made while uncounseled does not create an infirmity under the Fourteenth Amendment such as empowers a United States Court to set aside a conviction.

ARGUMENT

I

PETITIONER'S ORAL CONFESSION WAS NOT OBTAINED IN A MANNER VIOLATIVE OF PROCEDURAL DUE PROCESS OF LAW.

The due process guaranties for which we are here concerned are those afforded petitioner under the Fourteenth Amendment of the Constitution of the United States. Due process of law is secured against invasion by the Federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. *Betts* v.

Brady (1942), 316 U. S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252. It has been held since the early days of our constitutional history that the first ten amendments, or more accurately put, the first eight amendments, forbid the abridgment only by act of Congress or the United States Government, its agencies and departments, of the rights therein guaranteed, and do not apply to acts of the states. 11 Am. Jur., Constitutional Law, Sec. 310, pp. 310, 311; *In re Sawyer*, 124 U. S. 200, 219, 8 S. Ct. 482, 492, 31 L. Ed. 402, 408. The cause here, springing as it does from a state court, invokes in this Honorable Tribunal the constitutional guaranties of the Fourteenth Amendment and of the Fifth Amendment only insofar as the right to refrain from giving self incriminating testimony is embodied in the Fourteenth.

Petitioner contends her trial was not fair and impartial because:

"(a) She was a person of limited education;

"(b) She was questioned directly after the funeral and burial of her husband;

"(c) The weather was extremely hot;

"(d) Members of her family were not permitted to be with her at the time of her interrogation;

"(e) She did not have counsel during the interrogation, although she requested counsel;

"(f) She was in a hysterical and emotional condition during the questioning;

"(g) She was questioned for a period of five and one-half hours without food or rest;

"(h) Her confession was not voluntary and inducements were made;

"(i) She was asked the same questions over and over;

"(j) At the beginning of the questioning before petitioner had been charged with any crime or advised of her constitutional rights, the District Attorney read the statutes relating to manslaughter and murder to petitioner as though petitioner was guilty of one or the other charge."

The Court below very carefully considers the foregoing contentions of petitioner and in its opinion holds that the confession was voluntary within the meaning of constitutional provisions against self incrimination and properly admissible in evidence. Mere *excerpts* from the record cannot suffice to apprise this Honorable Court of the facts upon which the Court below relied to sustain the findings of the trial judge that:

"First: There was no promise made or assurance given the defendant of any immunity from prosecution.

"Second: The defendant was advised of her constitutional rights.

"Third: There were no threats of violence or other threats, no promise or assurance given of any benefit or reward; and

"Fourth: Neither the method of questioning nor the physical or mental distress suffered by the defendant were, under the circumstances shown by the evidence, severe enough to constitute the abridgment of any constitutional guarantee of due process of law."

Whether a confession is "voluntary" and as such admissible, or "coerced" and thus wanting in due process, is not a matter of mathematical determination. *Haley* v. *State*, 332 U. S. 596, 97 L. Ed. 224. Absent a mental infirmity the "limited education" claimed for your petitioner did not make

her oral confession not voluntary. Your petitioner had been interrogated *prior* to the funeral and if the officers had reasonably suspected her part in the crime they would have deserved severe criticism had they not further questioned her immediately upon confirmation of their suspicions. The State Chemist completed his analysis and report on the late afternoon of July 8, 1955, and made delivery thereof at his office in the State Capitol (R. 36). The report confirmed the suspicion of the officers that the deceased was poisoned. The questioning of your petitioner, here complained of, occurred on July 9, 1955 (R. 54). July days in Utah are ordinarily "extremely hot." This we have to say for (a), (b) and (c) of your petitioner's argument as to the voluntariness of her confession.

Petitioner next complains that members of her family were not permitted to be in the room with her during her interrogation, *although her father and uncle requested it.* It is understandable that the sheriff would desire to prevent persons from coming in and out of the Courtroom where the questioning took place (R. 56); and, there was nothing wrong with the sheriff's request of Mrs. Ashdown that he talk to her alone (R. 102). Now, did the father and uncle actually request or demand to be with your petitioner during the interrogation, and, if they did, why were they not called to make such an assertion to the jury? A careful reading of the testimony of the uncle does not so indicate (R. 77-83). The witness said:

> "* * * we didn't try to get in anymore than I says 'I don't think that they had a right to take her in and question her, without her father's presence or an attorney.' I told them that several times." * * *

The record shows that the father of your petitioner at no time requested to enter the interrogation room (R. 84-86).

In *Brown* v. *Allen*, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (February 9, 1953), this Honorable Court says:

> "* * * Under the leadership of this Court a rule has been adopted for federal courts, that denies admission to confessions obtained before prompt arraignment notwithstanding their voluntary character. *McNabb* v. *United States*, 318 U. S. 332, 87 L. Ed. 819, 63 S. Ct. 608; *Upshaw* v. *United States*, 335 U. S. 410, 93 L. Ed. 100, 69 S. Ct. 170. Cf. *Allen* v. *United States*, No. 11,132, 91 App. D. C. 197, 202 F. 2d 329, decided July 18, 1952. This experiment has been made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance. But the federal rule does not arise from constitutional sources. The Court has repeatedly refused to convert this rule of evidence for federal courts into a constitutional limitation on the states. *Gallegos* v. *Nebraska*, 342 U. S. 55, 63-65, 96 L. Ed. 86, 93, 94, 72 S. Ct. 141. Mere detention and police examination in private of one in official state custody do not render involuntary the statements or confessions made by the person so detained." * * *

Petitioner complains for lack of counsel during her examination *although she requested it* and her father and uncle requested it. There is no conflict in the evidence to the fact that petitioner did not request counsel until after she had confessed that she put the strychnine in the cup (R. 59). The State of Utah readily concedes that your petitioner's father and uncle did at various time suggest that she should have an attorney. There is nothing in the record to suggest that either the father or the uncle were not at

liberty to provide the petitioner with counsel at any time. Of this the record speaks:

"Q. * * * Now, Mr. Hopkins, were you at the courthouse after the funeral of Ray Ashdown?

"A. I was, yes, sir.

"Q. Would you tell the court what time you arrived there after the funeral? Just tell him what took place there in your own language, will you?

"A. I remember, if my memory serves me rightly, I appeared there between four and five o'clock and went immediately into the sheriff's office; and there we contacted Mr. Benson, Sheriff Miller and Sheriff Bybee, and as I remember it right, I made the remark that it didn't look to me like a fair, square deal, to railroad that girl into that sheriff's office without counsel or friends of any description.

"Q. What was the answer to that?

"A. Well, if I remember right, I believe Mr. Benson related that she was under suspicion. And if I remember right I believe I told him that we was very sorry, that we had no—that was the first information I had to that effect that she was even under suspicion, and he informed me that she was under suspicion.

"Q. Did you ask for counsel then?

"A. Yes. I said 'I believe that she should have an attorney in there.' And I made the remark that I intended to employ you as an attorney. There was considerable confusion around there, back and forth and so forth,—

"Q. Well now,—

"A. As I remember right, those are the words I said.

"Q. How long did you remain, Mr. Hopkins, in the courtroom?

"A. Well, we were there off and on from about 5:00—I would say 4:30 to 5:00 o'clock, until appropimately 9:00 o'clock.

"Q. Nine o'clock.

"A. And there was at intervals I was not in the sheriff's office, we accompanied Mr. Benson up to the house, Walter Segler and myself, and Mrs.—the Welfare lady, we accompanied them, and Mr. Benson up there on two different trips during that interval, at that time.

"Mr. Erickson: I think that is all, Mr. Hopkins."

Cross-examination.

By Mr. Fenton:

"Q. Mr. Hopkins, actually your statement made in reference to employing Mr. Erickson was made that evening after you had talked to your daughter, and not before, is that not correct?

"A. Well, now, I wouldn't be certain as to just when that remark was made, but it was made some time during that afternoon.

"Q. As a matter of fact, Mr. Hopkins, that remark was made in the presence of Sheriff Nelson, Mr. Wells, myself, after you had visited your daughter in the courtroom, is that not true?

"A. Well, that may be the case. I wouldn't say that it wasn't" * * * (R. 85, 86).

On the trial of a criminal case in a state court the introduction in evidence of a free and voluntary confession made while uncounseled does not create an infirmity under the Fourteenth Amendment which empowers a United States Court to set aside a conviction. *State* v. *Sullivan*, 10th Cir.,

227 F. 2d 511. This Honorable Court has held and affirmed that state courts are not bound to exclude a confession because, without coercion, it was obtained while a prisoner was uncounseled. *Strobel* v. *California*, 343 U. S. 181, 197, 96 L. Ed. 872, 884, 72 S. Ct. 599; *Lisenta* v. *California*, 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280; *Stein* v. *People of the State of New York*, 346 U. S. 156, 187, 188, 97 L. Ed. 1522, 1544, 73 S. Ct. 1077, 1094. (June 15, 1953.)

The State of Utah further concedes that appellant was naturally emotionally upset at the time of the questioning. No one would expect her to have been calm and unexcited but there is nothing in the record to indicate that your petitioner was hysterical or that she did not understand what she was doing. The fact is that your petitioner's own testimony refutes any such contention; she knew what was transpiring during the questioning:

> "Q. Milda, will you tell the court when you were being examined by the officers what Pat Fenton told you in reference to killing those men? Tell the court, will you, please?
>
> "A. Well, he said 'If you will tell us what happened, why it will go a lot easier on you.' He says 'I confessed and it was a lot easier on me, if I hadn't confessed I might not gotten off, I might have been facing the firing squad now.'
>
> "Q. That statement was made where, Milda, and when?
>
> "A. Oh, it was in the courtroom there. It was quite some time after I had been in there and they had been questioning me. He said that.
>
> "Q. Do you remember who was present, Milda, when that was said?
>
> "A. I am pretty sure they all was in there.

"Q. You are pretty sure on that?
"A. Yes.
"Q. Now, you told me this story, you told me this as soon as I come over here.
"A. Yes.
"Q. This isn't the first?
"A. No.
"Q. You told me that when I talked to you?
"A. Yes.
"Q. Before the preliminary hearing?
"A. Yes" * * * (R. 84).

The evidence shows that your petitioner was questioned from 4:00 p. m. until about 9:30 p. m. and that she gave her confession within the last hour. The evidence further shows that she was not offered food during that period of time. There is no claim made here that she was threatened, hit or abused. We respectfully call this Court's attention to the case of *Gallegos* v. *Nebraska*. Gallegos was booked on a charge of vagrancy although working at the time. He was held in a Texas jail for eight days and questioned intermittently by police, sometimes kept in an 8'x8' cell. He received one meal a day. Gallegos claimed he was threatened but not hit. On the fourth day Gallegos admitted murdering his paramour in Nebraska. Apprehended September 19, 1949, Gallegos appeared before a magistrate for the first time October 13, 1949. Concurring in the affirmance of the conviction, Justices Jackson and Frankfurter said: "For 3 days Gallegos refused to tell his name. When he finally revealed his identity he went on and told all. He may have been of the impression that the authorities who were holding him knew more than they did. Only the fact that he was in custody, the fear that his deeds were known and the weight

of the crime on his conscience can be said to have coerced his confession." *Gallegos* v. *Nebraska*, 342 U. S. 55, 96 L. Ed. 86, 72 S. Ct. 141.

Your petitioner's oral confession was voluntary and no promises or inducements were made; the excerpts from the record cited by petitioner do not show otherwise. Petitioner contends inducements were made because (a) she was interrogated as to whether a mistake in administering the poison had been made; (b) criminal statutes pertaining to murder and manslaughter were explained to her; and (c) the prosecutor told her:

> "Q. Milda, will you tell the court when you were being examined by the officers what Pat Fenton told you in reference to killing those men?
>
> "A. Well, he said 'if you will tell us what happened why it will go a lot easier on you.' He said, 'I confessed and it was a lot easier on me, if I hadn't confessed I might not have gotten off, I might have been facing the firing squad now" (R. 84).

We make additions to your petitioner's excerpts from the record. Petitioner's Brief, page 24.

Sheriff Nelson on direct examination:

> "A. Well, then I asked Mrs. Ashdown again, I says, 'Now,' I says, 'Think and see if there has been a chance that there has been a mistake made, any kind of a mistake on that poison.' I says 'If there has been a mistake made' I says 'we should know about it and we could iron it out.' And she says, 'I don't know of any mistake.' And I says, 'Well, there is something happened and somebody should know something about it.' 'Well,' she says 'do you want me to confess to something I didn't do?' I says 'No, we don't want you to confess to anything you didn't do; don't want anyone to confess to something they didn't do.' And I think that was told to her at least twenty-five or

thirty times during the conversation in the evening. She did bring it up several times 'Do you want me to confess to something I didn't do?' She was told each time that none of us wanted her to confess to anything she didn't do.

"Q. And what is the next conversation as you remember it, sheriff?

"A. Well, I think I said to her 'Do you have any idea how that poison got in that cup?' I says 'Do you think there is any chance that Ray put it in, that Ray got hold of any poison anywhere that you know of?' And I think she said again no, that she didn't know of any. And I think I asked her about the same thing over again, that somebody must have put some poison in the cup because Ray was pronounced being poisoned. I says 'Now, tell me, how did the poison get in the cup. Do you know? Can you tell me how it got in the cup?' She says 'Ray put it in.'

"Q. Did she go into detail as to how Ray put it in?

"A. I asked her how Ray put it in. I says, 'What was the strychnine in?' She says 'It was in a small envelope.' She took her thumb and finger and held it like that. I says 'Did he pour the strychnine out of the envelope into the cup?' She said yes. I said 'What became of the envelope?' She says 'I took it in the bedroom and threw it in the bedpan. 'Well,' I says, 'Mrs. Ashdown, was there any liquid in that bedpan?' She said 'Yes.' I says 'What finally became of the bedpan?' She says 'I took it out the back and emptied it down the toilet hole.' I says 'What did Ray say at the time he took that poison?' She said 'Ray told me to get rid of all the evidence and to not tell anybody about it.' And so we didn't say anything at all, no one said a word to her for a minute or two; and finally I said, 'Mrs. Ashdown, 'I don't believe that Ray put that poison in that cup. Why don't you tell us the truth about that poison and how it got in the cup.' I says 'Tell us the truth about it so as we

can clear this thing up.' She started crying and said 'I will never see my children any more.' And I says, 'Yes, you would see your children again, Mrs. Ashdown.' I says, 'Your children will be taken care of.' I says, 'Just tell us who put the poison in the cup.' She says, 'I put it in.' I says 'How much did you put in, Mrs. Ashdown?' She says 'I put in five or six grains.' She says 'I figured on taking it myself and decided to give it to Ray' * * * (R. 58, 59).

Petitioner's Brief, page 25.

Sheriff Nelson on cross examination:

"Q. Then I ask you at the hearing, to impress it very much, at that time I will ask you did not Patrick Fenton, the district attorney, in your presence and in the presence of Mr. Welsh, says 'I killed five men while I was in the Army and it is better to confess, I got off. If I hadn't done that,' and you studied and you studied, and you said you didn't hear that statement.

"A. I still say I didn't hear that statement.

"Q. Would you tell the court that that wasn't said in that courtroom?

"A. No, but it wasn't said in my presence.

"Q. And you know it was said, don't you?

"A. No.

"Q. Don't you?

"A. I don't know for sure that it was said.

"Q. Hasn't Mr. Fenton told you he made that statement?

"A. Since the preliminary hearing.

"Q. Yes.

"A. Yes.

"Q. And you knew that?

"A. No, not at the preliminary hearing.

"Q. You know now it was said.

"A. Yes, I know there was something to that effect, now, yes.

"Q. And it would go easier on her because he did it, was that not said in that place?

"A. Not in my presence.

"Q. But it was said in that courtroom, you know.

"A. I don't know whether it was or not.

"Q. Have you talked to anyone since I quizzed you on that?

"A. It wasn't said in my presence.

"Q. But you know it was said.

"A. I don't know it was said, either.

"Q. Hasn't somebody talked to you about it?

"A. No, they haven't talked to me.

"Q. Hasn't that been mentioned, sheriff?

"A. Yes, it has been mentioned, but it has never been mentioned if she made any promises it might go easier on her, that was never mentioned to me.

"Q. That was never mentioned to you?

"A. No.

"Q. But you hesitated for fifteen or twenty minutes, I tried to pull that out of you, but you said you couldn't remember.

"A. I couldn't. That is why I hesitated.

"Q. But you wouldn't say it wasn't said in your presence, you said you couldn't remember, didn't you sheriff?

"A. It wasn't said in my presence.

"Q. Well, but you said you don't remember, it might have been said but you don't remember.

"A. I don't remember.

"Q. Is that right?

"A. No, I don't remember hearing it * * * (R. 70, 71).

Petitioner's Brief, page 26.

Sheriff Wells on further direct examination:

"A. Mr. Fenton made the statement as I recall being in quite a predicament at one time his self; that he was accused of killing four men and through the cooperation of the investigating officers and by telling the truth the investigating officers was of much value to him and possibly had saved him from the firing squad.

"Q. Where, with relation to this conversation you have told us about did this particular conversation come in?

"A. This was after, as I recall it, this was after she had been advised that her husband's death was caused by strychnine poisoning, and the statute of first degree murder and manslaughter was read to her. I think that statement that you made, Mr. Fenton, then was following.

"Q. Mr. Wells, was the statement made in connection with questioning about the possibility of an accident, or was it made in connection with questioning about an intentional act?

"A. That was an accident, as I understood it.

"Q. At the time the investigation was going into the possibility of an accident?

"A. That is right.

"Mr. Fenton: Now, your Honor, is there any other item the court would like gone into by Mr. Wells at this time? I believe there is one other question I should ask, your Honor.

"Q. Mr. Wells, in relation to the 9th day of July or any other time, do you know of any promises or offers that were made to Mrs. Ashdown that if she would tell what happened she would not be prosecuted?

"A. Not in my presence, no, sir * * * (R. 94, 95).

Petitioner's Brief, page 27.

Patrick H. Fenton, on examination by the Court:

"Q. Mr. Fenton, there has been some testimony that you on the—was it the 10th of July that that questioning occurred in the courtroom?

"A. No, sir, on the 9th of July.

"Q. The 9th of July. Referring to the testimony of the sheriff and Deputy Wells, regarding conversations with the defendant in the courtroom at the City & County Building in the afternoon or evening of the 9th of July, there was some statement made relative to the defendant being advised that it would be better for her if she told what had happened. Was any statement like that made by you or the sheriff or Deputy Wells, to Milda Ashdown?

"A. No, your Honor.

"Q. Did you tell her 'If you will tell us what happened why it will go a lot easier on you,' in substance or effect?

"A. No, your Honor.

"Q. Did either the sheriff or Deputy Wells make any statement to that effect to Milda Ashdown?

"A. No, your Honor, not in my presence.

"Q. Now, what was said regarding some circumstance of your having been involved in some investigation and that you had avoided proceedings by telling what had happened? Was there anything said on that subject by you to Milda Ashdown that day?

"A. Yes, your Honor.

"Q. Will you tell us what it was, as accurately as you can.

"A. Yes, your Honor. Mrs. Ashdown had been asked by the sheriff several times if there was any possibility of an accident in connection with this matter, if she might possibly have got hold of some poison and put it in the glass of lemon juice thinking it was salt. And at one point during that phase of the conversation I told Mrs. Ashdown that at one time

in Europe I had been accused of killing five men and that I had told the investigating officers of what had happened, and that they had helped and, in effect cleared me of the charges, and that if it was an accident she might wish to tell the investigating officers what had happened. That is the conversation as nearly as I can remember it, your Honor.

"Q. Now, in relation to this matter of reading the statutes as testified to by Deputy Wells, will you state what was said preliminary to the reading of those statutes?

"A. Yes, your Honor. It was in line with the same phase of questioning concerning possibility of an accident; and I either got the statute or asked one of the officers to get it, I am not sure which, it was brought in at my request or else I went and got it, and it was explained to Mrs. Ashdown—

"Q. Just a moment—

"A. All right. Or told Mrs. Ashdown—

"Q. Say who said what.

"Q. Yes. I told Mrs. Ashdown that as I saw the matter there was a possibility of either first degree murder or involuntary manslaughter, if she had done it, and that the penalty for involuntary manslaughter was up to one year in the county jail; and that the penalty for first degree murder was, with a recommendation of leniency from the jury, either death or life imprisonment and without that recommendation a mandatory death penalty and then I read the statutes covering those particular subjects. The only conversation was first degree murder and involuntary manslaughter; there was nothing said about second degree murder or voluntary manslaughter * * * (R. 105-107).

Petitioner's Brief, page 28.

Sheriff Nelson on direct examination:

"A. I told Mrs. Ashdown, I says, 'Is there any chance, possible chance, that there has been a mistake

made, accidentally or any other way?' And I says, 'If there has, I wish we knew about it.' And she said she didn't know of any. Well, I says, 'Someone must know something about it.' She says, 'What do you want me to do, confess to something I didn't do?' I says 'Absolutely not, we don't want anyone to confess to something they didn't do.' I says, 'That is the last thing we want you to do, confess to anything you didn't do.'

"Q. Did any of the other parties in the room have a conversation with Mrs. Ashdown in your presence?

"A. Yes, Mr. Wells, the deputy sheriff, Wells, he talked some to Mrs. Ashdown. And I remember you, Mr. Fenton, talked to her.

"Q. Do you remember any of the conversation between myself and Mrs. Ashdown?

"A. Well, not clear enough that I would be able to repeat it. It is quite a job to remember all you say yourself in these cases.

"Q. All right, sheriff, what is the next conversation that you remember?

"A. I believe I asked Mrs. Ashdown if Ray ever got despondent and she said yes, he did, several times. I says, 'In what way?' And she says, 'Well, he has told me several times that he wished he was dead.' And then she went on for some time telling us about some of the family affairs, which she did right on the start too.

"Q. And do you remember any further conversation, sheriff?

"A. Well, I remember still asking Mrs. Ashdown if there is any possible chance that Ray could have got hold of any poison. She says not that she knew of. And later on I asked her just about the same question. And I says, 'Someone had to—someone had to put the poison in that lemon juice, it is pronounced poison.' I says, 'How did it get in there? Can you tell me how it got in, or who put it in?' She says 'Ray put it in.'

"Q. Will you tell us as nearly as you can remember, sheriff, her words at that time?

"A. I says—oh, I says, 'What kind of a container was the poison in?' She said it was in a small envelope. And I said 'Did Ray put it in himself?' And she said 'Yes.' I says, 'What did Ray say to you at that time?' She said 'Ray told me not to tell anyone'—

"Mr. Erickson: I object to that as incompetent, irrelevant and immaterial, as a deceased person, 'Ray told me'—

"The Court: The objection is overruled.

"A. She said 'Ray told me to destroy all the evidence and not to tell anyone.'

"Mr. Erickson: Your Honor, I make the same objection, what Ray told her, a deceased person who is dead.

"The Court: The objection is overruled. The answer may stand.

"Mr. Erickson: Exception.

"Q. Who next spoke and what was said, sheriff?

"A. I spoke to her next. We didn't say anything for a few minutes, only looked at each other. Finally I said to Mrs. Ashdown, I said, 'Mrs. Ashdown, I don't believe that Ray put that poison in that juice,' I said, 'Why don't you tell us the truth about that poison and who put it in?' She says 'I'll never see my children any more.' 'Yes,' I says 'You'll see your children again, that will be taken care of.' I says, 'Who put the poison in?' She says 'I did.'

"Mr. Erickson: Now, just a minute, I move to strike that from the record under the court's own ruling, going back to his testimony there, that is improper. That was the last question we solved before your Honor, was that very thing.

"The Court: The objection is overruled.

"Mr. Erickson: May I ask him one question, your Honor?

"The Court: Yes."

By Mr. Erickson:

"Q. Was this before she asked for counsel?

"A. Yes, that was before she asked for counsel?

"Q. All right, you are sure of that sheriff?

"A. Yes, sir * * * (R. 117-119).

"A. I asked Mrs. Ashdown about the container, what she had did with the container, when she had placed the container on top of the Frigidaire; then I asked her why that she had came in the house with Dr. Williams, went out into the kitchen, washed and rinsed the cup that the lemon juice was mixed in, and laid the cup on top of the dishes that were in the draining board.

"Q. What was Mrs. Ashdown's answer?

"A. There was no answer.

"Q. Did you ask that question once or more than once?

"A. I asked that question ten or fifteen times.

"Q. Was it answered for you at any time?

"A. No, sir.

"Q. Who spoke next and what was said?

"A. Mr. Nelson, I believe, questioned Mrs. Ashdown, I think at that time he asked Mrs. Ashdown about the contents of the cup, the lemon juice, and if she knew at that time how that this strychnine was put in the cup.

"Q. And who next spoke, and what was said?

"A. Mrs. Ashdown at that time made the statement that her husband Ray had poured the strychnine

in the lemon juice and had asked her to destroy the envelope that the strychnine was in and not to tell anyone about it.

"Q. Who next spoke, and what was said, Mr. Wells?

"A. Mr. Nelson at that time asked Mrs. Ashdown, he told Mrs. Ashdown that he didn't believe that that was the truth, that he didn't think that Ray had mixed the strychnine in the lemon juice; therefore, he asked Mrs. Ashdown to tell him the truth about who put the strychnine in the lemon juice, and Mrs. Ashdown answered him, 'I did'." * * * (R. 127).

Studied in context, the excerpts of your petitioner's report of the testimony show that no promise or inducement was put forth by the inquiring state officials.

As to petitioner's point (i) the State of Utah admits that the accused was asked some of the same questions "over and over".

Petitioner finally contends:

"(j) At the beginning of the questioning before petitioner had been charged with any crime *or advised of her constitutional rights*, the District Attorney read the statutes relating to manslaughter and murder to petitioner as though petitioner was guilty of one or the other charge." (Emphasis added.)

The record speaks otherwise:

"Q. Mr. Wells, I call your attention to the 9th day of July 1955, were you present at a meeting in the City & County Building in Cedar City, Utah where Mrs. Ashdown was present?

"A. Yes, sir.

"Q. To the best of your recollection what time did that meeting commence?

"A. Around 4:00 p. m., the afternoon, Saturday, the 9th.

"Q. Will you tell who was present, please?

"A. Mr. Patrick Fenton, District Attorney, Sheriff Arthur Nelson, and myself.

"Q. Mr. Wells, will you tell us as nearly as you can remember the conversation that took place that afternoon?

"A. When we first entered the courtroom with Mrs. Ashdown, Mr. Nelson asked the question of whether or not that she remembered anything that could be of any assistance to the officers.

"Q. Had Mrs. Ashdown been told that her husband had died of strychnine?

"A. At that time, yes.

"Q. Go ahead, please.

"A. Mrs. Ashdown immediately answered Mr. Nelson that she didn't know of anything that could be of any help and immediately told Mr. Nelson that Mr. Ashdown had been despondent on several occasions.

"Q. And after Mrs. Ashdown made those statements what next was said?

"A. Mr. Patrick Fenton advised her of her constitutional rights, and also at that time told her the difference between first degree murder and manslaughter, and even read the state statutes to her" * * * (R. 89, 90).

And,

"Q. Mr. Wells, you stated to the court that Patrick Fenton read the statutes to her, is that right?

"A. That is true, yes, sir.

"Q. Now, would you tell me, was that read aloud to her?

"A. Yes, sir.

"Q. What did the statute say?

"A. It was defining the difference between first degree murder and manslaughter.

"Q. Manslaughter?

"A. Yes, sir.

"Q. Now, was the constitution read to her?

"A. The Constitution?

"Q. Her rights?

"A. She had been advised of those rights before hand; Mr. Erickson" * * * (R. 97, 98).

To the first issue here presented:

"Was petitioner's oral confession obtained in violation of petitioner's constitutional guaranties as embodied in the Fourteenth Amendment to the Constitution of the United States of America?"

the State of Utah respectfully contends that the answer is *no*.

II

THE ADMISSION IN EVIDENCE OF THE ORAL CONFESSION WAS IN NOWISE VIOLATIVE OF DUE PROCESS OF LAW.

The established rule in Utah is that the duty of determining whether an admission or confession of a defendant was voluntary rests with the trial court. *State* v. *Crank*, 105 Utah 332, 142 P. 2d 178, 170 A. L. R. 542; *State* v. *Braasch*, 119 Utah 450, 229 P. 2d 289. The Fourteenth Amendment

leaves the states free to allocate functions as between the judge and jury as they see fit. In *Stein* v. *New York*, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077, this court wrote:

> "The Fourteenth Amendment does not forbid jury trial of the issue. The states are free to allocate functions as between judge and jury as they see fit. * * * Many states emulate the New York practice, while others hold that presence of the jury during preliminary hearing is not error. Despite the difficult problems raised by such jury trial, we will not strike down as unconstitutional procedures so long established and widely approved by state judiciaries, regardless of our personal opinion as to their wisdom."

Federal courts have long regarded it as proper for a Court, in passing on the voluntariness of a confession for the purpose of determining its competency, to hear evidence on that question in the absence of the jury. *Hale* v. *United States* (1928; C. C. A. 5th), 25 F. 2d 430; *Ramsey* v. *United States* (1929; C. C. A. 8th), 33 F. 2d 699; *McNabb* v. *United States* (1941; C. C. A. 6th), 123 F. 2d 848.

Your petitioner approaches this question under the assumption that the confession was *involuntary*; the State of Utah contends that the confession was *voluntary*. That is the exact issue this court is called upon to determine under the first of the questions here presented. The State of Utah never has claimed and does not now claim that use of a coerced confession is permissible in any court of the land—not excluding the courts of Utah. We endorse the authorities cited by your petitioner for the proposition that the Constitution of the United States stands as a bar against the conviction of any person in an American court by means of a coerced confession.

III

THE COURT'S INSTRUCTION NO. 6 WAS CORRECT IN ALLOWING THE JURY TO WEIGH THE CIRCUMSTANCES SURROUNDING THE GIVING OF THE CONFESSION AND DETERMINING NOT THE ADMISSIBILITY OF THE CONFESSION BUT RATHER THE CREDIBILITY OF THE CONFESSION AS EVIDENCE.

The instruction complained of:

> "In this case there has been testimony that on two occasions the defendant was questioned or interviewed in the presence of the sheriff and other officers and that she made certain statements in answer to questions. Referring to such alleged statements, you are instructed to consider carefully all the surrounding circumstances including the events of the day and days immediately preceding. You should consider the attitude and conduct of the officers mentioned, their statements to the defendants, and whether any threats were made or any promises, either express or implied, of immunity from prosecution, or whether any assurance was given of any benefit or reward to the defendant if she made a statement. You should also consider the length of time covered by the questioning and whether the circumstances show any coercion or compulsion or any physical or mental strain or suffering or fear or hysteria on the part of the defendant during the time. After giving due consideration to all the surrounding circumstances, you should determine whether the alleged statements or any of them are entitled to be believed and if so to what extent. You are the exclusive judges of the credibility of such statements and the weight to be given to them if you believe that any such statements were made."

Your petitioner complains of the instruction as follows:

> "The jury in the instant case then did not have before it all of the evidence on the question of whether the confession was voluntary and the circumstances surrounding its being made, because the testimony of Patrick H. Fenton, the district attorney, John Walter Segler, Milda Hopkins Ashdown and William Henry Hopkins was not submitted to the jury. This testimony was given in the absence of the jury and before the court only. The jury did not hear the testimony of Patrick H. Fenton as to the statement made by him to defendant that he had killed five men in Europe and confessed, they did not hear the testimony of John Walter Segler, an uncle of the accused, who testified that he protested the 'railroading' of that girl, and requested that she be given an attorney and that he was kept out of the room in which she was being questioned and told she had an attorney, or of her father, William Henry Hopkins who testified to the same thing, and the testimony of Milda Hopkins Ashdown herself, who testified that Pat Fenton, the district attorney, had told her he killed five men while in the Service and confessed or might have faced a firing squad and that it would be better for her to confess.
>
> "It was the duty of the court to recall all of these witnesses and submit all of this evidence to the jury before instructing them to pass upon and determine the weight and credibility to be given the admissions of petitioner.
>
> "Such exclusion of testimony from the jury denied petitioner a fair trial and due process of law."

Your petitioner raises this issue in this court for the *first* time. The Utah Supreme Court was not called upon to adjudicate any such question.

It is of moment to note that of the witnesses not called to testify before the jury the father and uncle were *defense* witnesses who had been *called by the defense* to testify to the court; that counsel for the defense elected not to call Patrick Fenton, the State's prosecutor (R. 109) and, finally, Milda Hopkins Ashdown, the defendant, did not elect at the trial to testify on her own behalf. We are of the considered opinion: First, that this issue should not be resolved in this Court without the State Court first having considered and passed upon it. *Musser* v. *State* (Utah), 333 U. S. 95, 68 S. Ct. 397, 398, 92 L. Ed. 562. Second, that this final contention of defendant is without merit and the result of defendant's own election.

CONCLUSION

The decision of the Supreme Court of the State of Utah should be affirmed.

Respectfully submitted,

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